Supreme Court, U. S.
FILED
MAY 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1794

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner

v

GEORGE SUMMERS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

WILLIAM L. CAHALAN
Prosecuting Attorney
County of Wayne
State of Michigan

EDWARD REILLY WILSON
Chief Appellate Attorney

TIMOTHY A. BAUGHMAN (P-24381)
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit MI 48226
Phone: (313) 224-5794

TABLE OF CONTENTS

	Page
Index of Authorities	ii
Opinions Below	2
Statement of Jurisdiction	2
Questions Presented	3
Constitutional Provisions Involved . .	4
Statement of Facts	5
Reasons for Granting the Writ . . .	6
Conclusion	23
Appendix A	1
Appendix B	15
Appendix C	27

INDEX OF AUTHORITIES

Cases	Page
Brown v Illinois, 422 US 590 (1975)	21
Brown v United States, 411 US 223 (1973)	20
Burdeau v McDowell, 256 US 465 (1921)	21
California v Minjares, ____ US ____ 61 LEd 2d 892 (1979)	22
City of Tacoma v Mondell, 495 P2d 682 (Wash App, 1972)	17
Clay v United States, 246 F2d 298, 305 (CA 5), cert den 255 US 863, 78 S Ct 96, 2 LEd 2d 69 (1957).	11
Commonwealth v Smith, 348 NE 2d 101 (1976)	16
Commonwealth v Snow, 298 NE 2d 804 (Mass, 1973)	16
Delaware v Prouse, ___ US ___, 59 LEd 2d 660 (1979)	8
Dunaway v New York, ___ US ___, 60 LEd 2d 824 (1979)	6
Guerra v State, 496 SW 2d 92 (Ct App Tex, 1974)	17

Harris v New York,
401 US 222 (1971) 21

Martinez v State,
504 SW 2d 897 (Ct App Tex, 1974) . . 17

Michigan v Tucker,
417 US 433, 446 (1974). 21

People v Harrison,
226 NE 2d 418 (1967) 16

People v Harvey,
38 Mich App 39 (1972). 18

People v Kielczynski,
264 NE 2d 767 (Ill App, 1970) . . . 15

People v Lujan,
484 P2d 1238 (Colorado, 1971) . . . 17

People v McHale,
281 NE 2d 776 (1972) 16

People v Pugh,
69 Ill App 2d 312, 217 NE 2d 557 (1966). . 15

State v Loudermilk,
494 P2d 1174 (Kansas, 1972) 16

State v McClelland,
523 P2d 357 (Kansas, 1974) 17

Stone v Powell,
428 US 465, 486 (1976) 20

Terry v Ohio,
392 US 1 (1968) 8

United States v Calandra,
414 US 338, 348 (1974). 20

United States v Di Re,
332 US 581, 92 LEd 2d 210 (1947). . . 17

United States v Janis,
428 US 433, 446 (1976) 20

United States v Johnson,
475 F2d 977 (CA DC, 1973) . . . 11

United States v Micheli,
487 F 2d 429, 430 (CA 1, 1973) . . . 8

United States v Peltier,
422 US 531 (1975). 20

United States v Teller,
397 F2d 494 (CA 7, 1968) cert den,
393 US 937, 89 S Ct 299, 21 LEd
2d 273 (1968) 12

Walder v United States,
347 US 62 (1954) 21

Walker v United States,
117 US App D.C. 151, 327 F2d 597, 600
(1963) cert den, 377 US 956, 84 S Ct
1635, 12 LEd2d 500 (1964) 10

Wong Sun v United States,
371 US 471 (1963) 20

Ybarra v Illinois,
___ US ___, 62 LEd 2d 238 (1979) . . 6

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No.

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner

v

GEORGE SUMMERS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Now Comes WILLIAM L. CAHALAN, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by EDWARD REILLY WILSON, Chief Appellate Attorney, and TIMOTHY A. BAUGHMAN, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan, entered in the above-entitled cause on December 27, 1979, rehearing denied on February 29, 1980.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 68 Mich App 571; 243 NW 2d 689 (1976) and is appended as Appendix A. The opinion of the Michigan Supreme Court is reported at 407 Mich 432, ____ NW 2d ____ (12/27/79), and is appended as Appendix B. The order denying rehearing is appended as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on April 26, 1976. The judgment of the Michigan Supreme Court was entered on December 27, 1979 (rehearing denied on February 29, 1980). The jurisdiction of this Court is invoked under 28 USC Sec. 1257(3).

QUESTIONS PRESENTED

I

DO DUNAWAY V NEW YORK, ___ US ___, 60 LEd 2d 824 (1979) AND YBARRA V ILLINOIS, ___ US ___, 62 LEd 2d 238 (1979) COMPEL THE CONCLUSION, AS THE MICHIGAN SUPREME COURT HELD THEY DO, THAT THE "STANDARD FOR DETERMINING WHETHER A SEIZURE-DETENTION IS LEGAL IS NOT WHETHER THE POLICE OFFICER'S ACTIONS WERE REASONABLE UNDER THE CIRCUMSTANCES BUT RATHER WHETHER THE POLICE OFFICER HAD PROBABLE CAUSE TO ARREST"?

II

DOES A SEARCH WARRANT FOR PRIVATE PREMISES AUTHORIZE A SEARCH OF REASONABLE SCOPE AND INTENSITY OF PERSONS ON THE PREMISES WHERE THE ITEMS PARTICULARIZED IN THE WARRANT MIGHT REASONABLY BE EXPECTED TO BE CONCEALED ON THE PERSON (PARTICULARLY WHERE THE PERSON HAS STATED HE OWNS THE PREMISES, AND A LARGE QUANTITY OF THE PARTICULARIZED SUBSTANCE, HEROIN, HAS BEEN FOUND IN THE BASEMENT BEFORE HE IS SEARCHED)?

III

WHERE THE JUDGES OF THE COURTS THAT HAVE CONSIDERED THE OFFICERS' CONDUCT HAVE SPLIT 7-5 OVER WHETHER THAT CONDUCT WAS PERMISSIBLE UNDER THE CONSTITUTION, CAN IT BE SAID THAT THE OFFICERS KNEW, OR SHOULD HAVE KNOWN, THAT THEIR CONDUCT WAS NOT PERMISSIBLE UNDER THE FOURTH AMENDMENT, SO THAT THE EXCLUSIONARY RULE SHOULD BE APPLIED?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

On October 10, 1974, a team of Detroit Police Officers was dispatched to execute a warrant to search premises located at 9356 Mansfield. The warrant was issued to search the entire premises and seize heroin and any other narcotics and narcotics paraphernalia. The warrant recited that an informant had previously purchased heroin at the Mansfield address from a black male known as "George".

Upon arriving at the premises named in the warrant, police officers Lehman and Conant observed defendant leave the premises to be searched through the front door and proceed down the front porch steps. Officer Lehman approached defendant, identified himself as a police officer, and asked defendant if he lived in the house he had just exited. Upon defendant's affirmative response, Officer Lehman showed him the search warrant and asked him if he could open the door. Defendant replied that he could not because he had left his keys inside, but he could ring someone over the intercom.

One Dwight Calhoun opened the inner door upon defendant's request, but when Officer Lehman identified himself as a police officer and attempted to open the storm door (which was locked) Calhoun slammed the inner door shut in his face. The door was then broken down, and Officer Lehman instructed Officer Conant to bring defendant into the living room where he and the other seven persons in the house were detained while the search was conducted. No frisk was conducted pursuant to this detention.

A search of the premises revealed two plastic bags of suspected heroin under the bar in the basement. It having been determined that defendant was the owner of the premises, he was formally arrested on the narcotics charge. A custodial search of his person

followed, revealing a plastic bag of heroin in his jacket pocket. It was for possession of this heroin that defendant was ultimately charged.

Following a preliminary examination, defendant was bound over for trial. The trial judge granted a motion to suppress the evidence and quashed the information. The Michigan Court of Appeals affirmed the trial court, 68 Mich App 571; 243 NW 2d 689 (1976), and on December 27, 1979, the Michigan Supreme Court also affirmed, holding that the detention of defendant while the search was conducted was without probable cause, and, therefore, based on Dunaway v New York, ___ US ___, 60 LEd 2d 824 (1979) and Ybarra v Illinois, ___ US ___, 62 LEd 2d 238 (1979), unconstitutional. The heroin found in his jacket was thus properly suppressed, being the fruit of an illegal arrest. Three justices dissented, finding that the majority had employed the wrong standard in reviewing the officer's conduct and concluding that the temporary detention was reasonable and therefore constitutional. The dissenting justices found Dunaway v New York and Ybarra v Illinois to be distinguishable.

REASONS FOR GRANTING THE WRIT

I

THE DETENTION WAS REASONABLE AND THEREFORE CONSTITUTIONAL

The majority of the Michigan Supreme Court relied almost exclusively on this Court's decision in Dunaway v New York, ___ US ___; 99 S Ct 2248; 60 LEd 2d 824 (1979) in order to hold that the detention in this case was unconstitutional because not supported by probable cause to arrest to hold respondent to answer for a crime.

> The standard for determining whether a police officer's seizure-detention of a citizen violates the Fourth Amendment is clearly set forth by the United States Supreme Court in the recent decision of Dunaway v New York, . . . Justice Brennan's majority opinion holds that detention of a citizen beyond the narrow scope of Terry v Ohio . . . and its progeny, is reasonable only if supported by probable cause for arrest. Thus, the general standard for determining whether a seizure-detention is legal is not whether the police officer's actions were reasonable under the circumstances but rather whether the police officer had probable cause to arrest. (Emphasis in original; citations omitted).

Petitioner submits that this holding is at odds with numerous decisions from this Court[1] and is the very misconstruction of the Fourth Amendment and Dunaway v New York that Justice White cautioned against in his concurring opinion in Dunaway:

> The opinion of the Court might be read to indicate that Terry v Ohio . . . is an almost unique exception to a hard-and-fast standard of probable cause. As our prior cases hold, however, the key principle of the Fourth Amendment is reasonableness - the balancing of competing interests (citation omitted). 60 LEd 2d at 840

Not only is plenary review necessary to correct the Michigan Supreme Court's erroneous construction of the Fourth Amendment caused by its misreading of

---

[1] e.g. Delaware v Prouse, ___ US ___, 59 LEd 2d 660 (1979); Michigan v Tyler, 436 US 499 (1978); United States v Brignoni-Ponce, 422 US 873 (1975); Terry v Ohio, 392 US 1 (1968); Marshall v Barlow's, 436 US 307 (1978).

Dunaway v New York, but the decision is also in conflict with at least one circuit decision, which holds a claim that the occupant of premises which are being searched pursuant to warrant cannot be detained during the search to be "clearly frivolous." United States v Micheli, 487 F 2d 429, 430 (CA 1, 1973)

The circumstances of the present case are appropriate for "generic recognition" of an exception to the rule of probable cause "where more flexibility is essential." (Concurring opinion of Justice White, 60 LEd 2d 841). That is, this Court should recognize that a temporary detention of persons on premises (or on their way out the door as the police approach) which are to be searched pursuant to warrant, until the search is concluded, is reasonable and therefore constitutional. (Such a rule certainly would not be inconsistent with Ybarra v Illinois, which held only that occupants of a public premise, a tavern which is being searched pursuant to warrant may not be frisked; Ybarra does not hold that the patrons may not be detained until the search is concluded).

The dissenting opinion in the Michigan Supreme Court aptly sets forth why, once a reasonableness test is accepted, see Terry v Ohio and Delaware v Prouse, supra, the detention in the instant case should be viewed as reasonable. See Appendix B, pp. 30-38. The precise holding of Dunaway is, after all, that "detention for custodial interrogation - regardless of its label - intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest". (Emphasis added) 60 LEd 2d 838. In the instance of a substantially less severe intrusion and a different governmental interest (primarily the safety of the officers and avoidance of frustration of the warrant) Dunaway does not control. Petitioner urges that plenary review be granted to correct the erroneous construction given the Fourth Amendment by the Michigan Supreme Court due to its misreading of Dunaway v New York and Ybarra v Illinois.

II

A SEARCH WARRANT FOR PRIVATE PREMISES PERMITS A SEARCH OF REASONABLE SCOPE AND INTENSITY OF PERSONS ON THE PREMISES WHERE THE ITEMS PARTICULARIZED IN THE WARRANT MIGHT REASONABLY BE EXPECTED TO BE CONCEALED ON THE PERSON (AND PARTICULARLY WHERE THE PERSON SEARCHED IS KNOWN TO BE THE OWNER OF THE PREMISES AND A QUANTITY OF HEROIN, THE PARTICULARIZED ITEM, HAS ALREADY BEEN FOUND ON THE PREMISES DURING THE SEARCH).

Although the Michigan Supreme Court granted leave on this issue, inexplicably the court did not address it (inexplicably, because resolution of the detention issue adversely to petitioner does not resolve the case if defendant could be searched under the authority of the warrant). Petitioner submits that the search of defendant was justified under the warrant, and that Ybarra v Illinois does not compel a contrary result.

The Michigan Court of Appeals majority rejected Petitioner's argument that since the clothing of defendant was a place where heroin could be located, the search warrant for premises included within it a search of reasonable scope and intensity of defendant's person, as a person present on the premises (and named in the warrant as the owner), saying:

> The prosecutor misses the point of the statute. MCLA 780.651; MSA 28.1259 (1) only authorizes a magistrate to issue warrants to search certain places. Once a warrant has actually been issued,

> it cannot be broadly interpreted. A search warrant must describe the premises to be searched and the property to be seized with particularity, and the executing officers must narrowly follow the description. . . It is true that the magistrate could have issued a warrant to search any individual found on the premises, but he did not do so.. The 'particularity' requirement prevented the police from legally extending the scope of the warrant so as to authorize a search of defendant's person. Summers, 579 (Emphasis added).

Petitioner respectfully submits that this analysis sidesteps the issue, for the precise issue is whether a search of a person pursuant to a search warrant for premises is an extension of the scope of the warrant. Petitioner contends that just as it is clear that a search warrant for a premises need not specify and describe every container, every piece of furniture, within the premises in which the items to be seized might be secreted, neither must it necessarily specify and describe persons. A search of desk drawers, closets, etc. for narcotics would without doubt be considered to be a search of the premises of reasonable scope and intensity; so should a search of persons whose clothing contains places where narcotics might be concealed.

The issue of whether a search warrant for premises will permit a search of reasonable scope and intensity of a person on the premises, where the items named in the warrant could easily be concealed on the person was not, Petitioner submits, settled by Ybarra v Illinois. First, a look at cases from several jurisdictions is in order, though many of the cases deal with the search of personal property of a person present in the premises. In Walker v United States, 117 US App D.C. 151, 327 F2d 597, 600 (1963) cert den, 377 US 956, 84 S Ct 1635, 12 L Ed 2d 500 (1964), the court upheld the search of a wallet and bag held by one who shared occupancy of the residence searched under authority of a warrant, holding that a contrary result:

> . . . would be to suggest that a warrant to search premises may be frustrated by the device of simply picking up the guilty object and holding it in one's hand.

The court also cautioned that "There are obviously situations where the grant of the one (a search warrant for premises) cannot be enlarged to include the other (a search of the person)." (parentheses added).

In Clay v United States, 246 F2d 298, 305 (CA 5), cert den 255 US 863, 78 S Ct 96, 2 LEd 2d 69 (1957), dealing with a similar situation, the court held:

> . . . Appellant attacks the propriety of the court's refusal to suppress the evidence which was taken from Clay while standing on the porch of the Anderson house, assuming the search warrant for the premises was adequate. It is clear that without reference to the legality of the arrest of Clay, which we need not decide, the officers did have full authority under the search warrant to investigate the contents of the paper bag held in Clay's hand while on the front porch of the house. (Emphasis added).

The court, in United States v Johnson, 475 F2d 977 (CA DC, 1973) did not squarely face the question, holding that the search of the purse of a visitor pursuant to a search warrant for premises was proper where the purse was not being held by the person. Thus, the court said, the search was not that of the person, and, nothwithstanding defendant's status as a visitor, the purse could be searched as it could have concealed the items named in the warrant. Johnson, 979. Chief Judge Bazelon, concurring and dissenting, agreed that the suppression order could not stand, but for different reasons. He disagreed that the search of the purse could be justified under the warrant, because the officers knew defendant to be a visitor on the premises. However, Judge Bazelon noted in passing that the warrant would

authorize the search of a person named in the warrant as the occupant of the premises (though apparently not named as a place to be searched):

> The warrant . . . authorized the search of an apartment that was . . . occupied by John Doe alias Pete described as a negro male, 49-50 years, 165 lbs., 5'6", medium complexion. I do not doubt that this authorized the search of 'Pete' as well as his apartment. But the warrant did not authorize a search of an individual the police knew to be a mere visitor in the apartment. Johnson, 980 (Emphasis added).

Thus, it appears that Judge Bazelon would allow the search of a person on the premises pursuant to a search warrant for premises where the items sought could be concealed on the person and the officers executing the warrant do not have knowledge that the person has no nexus with the premises (is a "mere visitor"). At the very least it is fair to say that Judge Bazelon would permit searches of persons named in the warrant as having some nexus with the premises.

The holding was similar in United States v Micheli, 487 F2d 429 (CA 1, 1973). The case involved a search warrant for certain business premises, and the search of defendant's brief case which was within the premises. The items sought were counterfeit notes. The court carefully analyzed the problem, saying that a focus on actual physical possession was at once too broad and too narrow - the approach of "immunizing from a search under sanction of a premises warrant any item within the physical possession of an individual on the premises". (United States v Teller, 397 F2d 494 (CA 7, 1968), cert den, 393 US 937, 89 S Ct 299, 21 LEd 2d 273 (1968), is too broad in that "a search warrant could be frustrated to the extent that there are hands inside the premises to pick up objects before the door is opened by the police," it is too narrow in that many personal effects which may be set down should not be subject to search. The court

turned to an examination of the relationship between the person and the place:

> . . . we base our decision on the fact that, as co-owner of the Hillside press (the premises), appellant was not in the position of a mere visitor or passerby who suddenly found his belongings vulnerable to a search of the premises. He had a special relation to the place, which meant that it could reasonably be expected that some of his personal belongings would be there. Thus, the showing of probable cause and necessity which was required prior to the initial intrusion into his office reasonably comprehended within its scope those personal articles, such as his brief case, which might be lying about the office. The search of his brief case, under these circumstances, was properly carried out within the scope of the warrant. Micheli, 432.

In a concurring opinion Judge Campbell rejected the majority's "relationship of the person to the place" standard, arguing that it "grants possible sanctury to all manner of arguably intimate personal effects carried upon the premises and then set down."

> A search of such objects is neither more nor less intrusive than would be the search of similar objects whose owner, having deposited them, had left the premises before the police arrived. Any search is an invasion of privacy; but I think the cause for issuance of the original warrant allows a search of relevant personal effects not in the possession of their owner as well as of all other relevant objects on the premises. The contraband or incriminating evidence covered by the warrant is as likely to be within brief cases or bags just brought on the

> premises as within other objects in the premises. (Footnote omitted) It is true that if the officer knows the owner of the brief case has no 'relationship' to the premises, he might have less reason to search. But in many cases the police would have no way of knowing, in advance, what is the individual's actual connection with the premises. When the stranger in the betting parlor solemnly announces that he is the family doctor, I am less sure than is the court that I would require the police to believe him - or inquire further before searching his bag. Micheli, 433.

Similarly, Petitioner submits that in cases of search of persons on the premises officers would rarely know the individual's actual connection with the premises, nor should officers be required to believe assertions of "non-relationship." Though the instant case could be justified on a relation of the person to the premises test, since defendant told the officers executing the warrant that he was the owner (see Judge Bazelon's opinion in Johnson, supra), Petitioner agrees with Judge Campbell that the test is unsatisfactory. A search of reasonable scope and intensity of persons on premises pursuant to a search warrant for those premises, where the items sought could easily be concealed on the person, should be permitted on the basis that the pockets of persons are places within the premises just as are desk drawers and closets. Both the majority and the concurrence did remark in passing that personal searches were not permitted pursuant to a search warrant for premises, Judge Campbell stating that such was an "exception" to what he perceived to be the rule that a search warrant ". . . justifies whatever intrusion may result from searching all articles found on the premises having characteristics making it possible for them to harbor the matter described in the warrant." Micheli, 433. As will be set forth more fully subsequently, Petitioner submits that the supposed "exception" is ill-founded and unjustifiable.

Several state courts have also had occasion to grapple with the issue. In People v Pugh, 69 Ill App 2d 312, 217 NE 2d 557 (1966), defendant was convicted of unlawful possession of narcotics as a result of a search of his person when he entered an apartment where police officers were engaged in the execution of a search warrant. The officers had been fruitlessly searching the premises for some fifteen minutes.

The court held:

> . . . the police while engaged in search had reasonable grounds to search Raymond Pugh as well. We agree that the execution of search warrants in narcotics cases is a risky business at best, and unless the police search all persons present on the premises they endanger both themselves and the search they are making. Furthermore, the entry of the defendant onto premises where the police have reason to believe narcotics are concealed provides further grounds for his search. The United States Constitution prohibits unreasonable searches (US Const, Am IV); the search of Raymond Pugh under the circumstances of this case cannot be so classified. Pugh, 315, 316 (Emphasis added).

See People v Kielczynski, 264 NE 2d 767 (Ill App, 1970), where in upholding the search of a person pursuant to a warrant for premises for gambling instruments, implements, and apparatus, the search revealing records of horse race bets, the court said:

> We conclude that the search of defendant's person, who was on the premises described in the instant search warrant, was reasonable and necessary for the execution of the warrant. Kielczynski, 771.

See also People v Harrison, 226 NE 2d 418 (1967); People v McHale, 281 NE 2d 776 (1972).

A barber shop was the premises described in Commonwealth v Snow, 298 NE 2d 804 (Mass, 1973), and the articles named were narcotics and narcotics paraphernalia. Defendant was not the owner of the premises, but was present when the warrant was executed. His coat was hanging on a hook, was searched, and heroin found. The court stated that the search was not a search of the person, but went on to say:

> The warrant authorized a search of the entire barber shop. It did not limit the police to looking at what was in open view and thus obvious. They had the right to search anywhere within the four walls of the barber shop where the contraband described in their warrant might be located. They could search the various rooms, closets or storage places, including possible concealed storage places. They could look on, under, behind or inside any piece of furniture, container or other object in the described premises, lift or remove any object to facilitate their search, and search the pockets, liners or any other parts of articles of clothing where the objects of their search might be secreted. Snow, 812.

See also Commonwealth v Smith, 348 NE 2d 101 (1976).

State v Loudermilk, 494 P2d 1174 (Kansas, 1972) involved the search of a person on the premises. Again, narcotics were the object of the search. The court upheld a statute which permitted the search of persons on premises that are objects of a search warrant, stating also that "we are not content to rest our decision solely on this theory:"

> Narcotics, such as heroin, are easily concealed on a person and may readily be disposed of. Where as in this case, probable cause to believe that a drug is kept or concealed on certain described premises is established to the satisfaction of a proper magistrate, the search of a person found on the premises in the execution of a search warrant is not only reasonable, but necessary to secure effective enforcement of the Uniform Narcotics Drug Act. Loudermilk, 1178 (Emphasis added).

See also State v McClelland, 523 P2d 357 (Kansas, 1974); Martinez v State, 504 SW 2d 897 (Ct App Tex, 1974); Guerra v State, 496 SW 2d 92 (Ct App Tex, 1974).

Several cases state the proposition that a search warrant for premises does not include a right to search persons on the premises. See e.g., People v Lujan, 484 P2d 1238 (Colorado, 1971); City of Tacoma v Mondell, 495 P2d 682 (Wash App, 1972). Most of these cases give little or no discussion to the rationale of such a rule, simply citing United States v Di Re, 332 US 581, 92 L Ed 2d 210 (1947) for the proposition. But in close analysis, Di Re does not support the rule.

Di Re involved a warrantless search. An officer was informed by one Reed that Reed was to buy counterfeit gasoline ration coupons from one Battita. Battita was followed as he went to the appointed place. Officers approached the auto - Reed had coupons in his hand and said he had received them from Battita, who was sitting in the driver's seat. Di Re was a passenger, and the officers had no information whatsoever regarding him. He was arrested and searched, and counterfeit coupons found on his person. The court held that there was no probable cause to search Di Re, nor to arrest him. Such a holding appears eminently reasonable. The opinion, however, contains some unfortunate dicta. The government had conceded that a warranted search of premises would not justify a search

of persons on the premises, (the precise question which is at issue here), and the court reasoned that an unwarranted search of an auto would not justify a search of all occupants. But clearly the facts demonstrate that the officers only had reason to believe Reed and Battita possessed coupons. To cite Di Re for the proposition that a premises directed warrant will not allow a search of the person is thus misleading.

That a police officer armed with a search warrant for premises may conduct a search of reasonable scope and intensity of persons on the premises where the items named in the search warrant could reasonably be expected to be concealed on the person is commended by policy and logic, particularly when the existence of the knock and announce requirements is considered. Before officers executing a search warrant may force entry they must request admittance, giving notice of their authority and purpose. MCLA 780.656. Case law holds that after announcing their authority and purpose the officers before forcing entrance must wait long enough for the inhabitants of the premises to reach the door from the room furthest away. See e.g., People v Harvey, 38 Mich App 39 (1972). Obviously, it would be a simple matter for a person present in the premises to pick up the item named in the warrant and put it in his pocket (where the item is of a sort easily concealed in a pocket). Or, upon seeing the approach of officers a person present in the premises could put the item, (for example a package of heroin), in his pocket and walk out the door. Perhaps not observing the officers, one present in the premises might put the heroin in his pocket and walk out the door, on the way to a delivery. The purpose of the warrant should not be frustrated by such facile maneuvers. A search of reasonable scope and intensity of persons on premises which are being searched pursuant to a warrant, where the items sought could easily be concealed on the person, considering the pockets on the person to be places within the premises and thus covered by the warrant, is a reasonable search,

and thus within the Fourth Amendment. The search in the instant case was within the scope of the warrant.

Petitioner submits also that Ybarra v Illinois, supra, does not control this case. The fact that a place of public accomodation, a tavern, was the premises named in the search warrant is alone sufficient to distinguish Ybarra. Although Petitioner has previously expressed the opinion that the "nexus to the premises" test is unduly restrictive, here defendant was known to be the owner of the premises and heroin had been found in the basement, both before he was searched. Petitioner contends, however, that a search warrant for private premises permits a search of reasonable scope and intensity of persons on the premises where the items named in the search warrant might reasonably be expected to be concealed on the person.

III

THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED WHERE THE OFFICER ACTED IN GOOD FAITH AND, VIEWED OBJECTIVELY, REASONABLY.

The Michigan Supreme Court majority did not hold that the conduct of the officer was unreasonable; rather, the court held that reasonableness was not sufficient to render the detention constitutional. Had the four members of the majority agreed with the three dissenting justices that reasonableness is the test, it may well be that all justices would have found the conduct reasonable. Petitioner submits that the reasonableness of the officer's conduct, even if

insufficient to render the detention constitutional, renders application of the exclusionary rule (which the majority felt compelled to apply by Wong Sun v United States, 371 US 471 (1963))wholly inappropriate. Here, of 12 judges to consider the officer's conduct five have found it constitutional, seven unconstitutional, and none have found it unreasonable.

This Court has made plain that the exclusionary rule is not a personal constitutional right of the person aggrieved, its purpose being to deter, not repair. United States v Calandra, 414 US 338, 348 (1974). Whether or not a suppression remedy should be applied depends on whether exclusion of the evidence would deter willful or negligent police conduct which violated some right of the accused. See United States v Janis, 428 US 433, 446 (1976): "The Court . . . has established that the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct' " (emphasis added), and Stone v Powell, 428 US 465, 486 (1976): "The primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights." Accord Brown v Illinois,422 US 590 (1975), opinion of Justice Powell. The test is well-stated in United States v Peltier, 422 US 531 (1975):

> If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment . . . we conclude that nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it requires that the evidence here be suppressed even if we assume that respondent's Fourth Amendment rights were violated by the search of his car. (Emphasis added) 422 US at 542.

Keeping in mind the observation in Calandra, 414 US at 348, that "Application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served," and that in Michigan v Tucker, 417 US 433, 446 (1974), that "where the official action was pursued in complete good faith . . . the deterrence rationale loses much of its force," it becomes apparent that where "the deterrence rationale of the exclusionary rule does not obtain" there is "no legitimate justification for depriving the prosecution of reliable and probative evidence." Brown v Illinois, supra. Nor would admission of the evidence here offend judicial integrity. As recognized in Peltier and Stone v Powell, supra:

> . . . judicial integrity is 'not offended if law enforcement officials reasonably believe in good faith that their conduct was in accordance with the law even if decisions subsequent to the search and seizure have held the conduct of the type engaged in by the law enforcement officials is not permitted under the Constitution.' 422 US at 538; 428 US at 485, fn 2.

As further support for the proposition that the "imperative of judicial integrity" does not operate to exclude evidence seized in all cases of Fourth Amendment violations, petitioner would point out that evidence seized by private persons in violation of the Fourth Amendment is not excluded in criminal trials. Burdeau v McDowell, 256 US 465 (1921). The requirement of standing to object is another example of a situation wherein a Fourth Amendment violation does not result in suppression. Brown v United States, 411 US 223 (1973). Note should also be taken of the fact that illegally seized evidence may be used for impeachment purposes. Walder v United States, 347 US 62 (1954); Harris v New York, 401 US 222 (1971). In short, the "imperative of judicial integrity" is a corollary to the principle of deterrence. The integrity of the court is

not offended where the court is not sanctioning and thereby encouraging "willful" violations of the Constitution.

In conclusion, petitioner would point out that this Court has held that the decision of whether the exclusionary rule should apply to a given situation involves a balancing process:

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police conduct therefore, we must consider whether the sanction serves a valid and useful purpose (Emphasis added). Michigan v Tucker, 417 US at 446.

> . . . when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence. Michigan v Tucker, 417 US at 450.

See also Justice White's dissent in Stone v Powell, supra.

To exclude the truth in a case such as this one, where there is involved no insolent use of authority, and where there is an absence of an incontestable compensating gain, is to inflict "gratuitous harm on the public interest," and is itself an affront to judicial integrity. Plenary review should be granted to consider the appropriateness of application of the exclusionary rule in this case. See Justice Rehnquist's opinion in California v Minjares, _____ US _____ 61 LEd 2d 892 (1979).

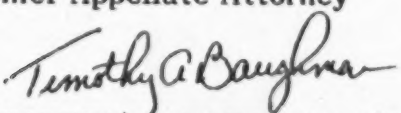
CONCLUSION

It is respectfully submitted that for the reasons outlined above plenary review should be granted.

Respectfully submitted,

WILLIAM L. CAHALAN
Prosecuting Attorney
County of Wayne
State of Michigan

EDWARD REILLY WILSON
Chief Appellate Attorney



TIMOTHY A. BAUGHMAN (P-24381)
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit MI 48226
Phone: (313) 224-5794

Dated: March 25, 1980

TAB:pd

Appendix A

People v Summers
68 Mich App 571
Opinion of the Court

Before: Bronson, P.J., and Bashara and M. F. Cavanagh, JJ.

Bronson, P.J. Defendant was charged with possession of heroin, contrary to MCLA 335.341(4)(a); MSA 18.1070(41). Prior to trial, defendant filed a motion to suppress the heroin which was the subject of the prosecution on grounds that it was the product of an illegal search. The trial judge granted that motion, quashed the information, and ordered defendant dismissed. The prosecutor appeals here.

The search in question occurred on the night of October 10, 1974. A team of Detroit police officers were dispatched that night to execute a search warrant for a house located at 9356 Mansfield in the City of Detroit. The warrant authorized a search of the premises, and named defendant as the owner of the house.[1] As the police converged on the above

---

[1] A copy of the warrant does not appear in the record. However, the discussion between the prosecutor, defense counsel, and the judge at the preliminary examination indicates the scope of the search warrant:

"Mr. McCloskey (the prosecutor): Under the search warrant, your Honor, they had the authority to search the entire premises.

"The Court: That's in the search warrant?

"Mr. McCloskey: Do you have a copy of the search warrant?

"I would assume that they exceeded their range, your Honor, but that might be proper subject of a different type of hearing in this court. But I would—I don't think that question has been raised.

"Yes, your Honor, it is generally search the premises

location, a man later identified as defendant was observed exiting the house. Patrolman Roger Lehman stopped defendant, and identified himself as a police officer.

When the police learned that defendant lived in the house, they ordered him to unlock the front door.

---

known as 9356 Mansfield, which is a 2-story single dwelling. And then it goes on to describe the rest of the--more specifically the type of dwelling it is, and exactly where it is located.

"But it's to search the entire premises.

"The Court: It says that, entire premises?

"Mr. McCloskey: No, it says premises, your Honor, but I think that would assume the entire premises, it doesn't limit it to the first floor or the second floor or any specific room in the place, I think that's a reasonable reading on the face of the search warrant, that it means the entire premises, since it is not limited.

* * *

"Mr. Mitchell (defense counsel): Your Honor, I don't think it (The narcotics seized from the person of defendant) should be admitted. * * * If they had a search warrant they could just serve the search warrant. There is nothing in the search warrant that says they had to search the person of Mr. Summers out on Mansfield. The search warrant was to search the premises. Now they went--

"The Court: what about the fact he was coming out as they were going to execute the search warrant?

"Mr. Mitchell: Well he still was not in the--the search warrant is to search the premises, not to search this man. They had no--they had no--even after the man got in the house they had no cause to search the man."

The prosecutor has never argued here or below that the warrant expressly authorized a search of the person of defendant.

Defendant responded that he did not have his keys with him, and that he would have to use the intercom to convince someone inside to open the front door. Defendant spoke to a person named Dwight over the communication system, instructing Dwight to let him into the house. A few minutes later, Dwight Calhoun appeared at the door. Patrolman Lehman identified himself as a police officer, but Calhoun just stood there. When Lehman tried to open the locked storm door, Calhoun slammed the inside door shut.

Three of the officers quickly moved up and knocked down the front door. As they did so, Officer Lehman observed Calhoun running toward a downstairs bedroom. Lehman started chasing Calhoun after instructing another officer, Anthony Conant, to bring defendant inside. Conant escorted defendant into the house as the other members of the police team "secured" the house.[2] Patrolman Lehman

---

[2] Officer Conant was never directly asked whether defendant voluntarily went into the house. A fair reading of the testimony, however, indicates that he had little choice. For example, on cross-examination of Conant, the following exchange occurred:

"Q. (defense attorney): All right. Well when you came around to the front of the house you did see--did you see Mr. Summers, is that right?

"A. I did.

"Q. And Mr. Summers was outside of the house, is that right?

"A. He was.

"Q. Now Mr. Summers was outside of the house, and you took him back in the house, is that right?

"A. I did.

"Q. Now he wasn't a member of your crew, was he?

"A. No, he was not.

"Q. And you didn't think he was going to aid you at all in making this raid, did you?

meanwhile pursued Calhoun into the bedroom, and saw Calhoun toss a "pack" onto the bed. The "pack" was retrieved and was found to contain suspected heroin. Calhoun was placed under arrest and escorted back into the living room. Other persons, variously described as five, six, or eight in number, were found in the house and brought into the living room by other police officers.

After Calhoun was brought into the living room, and the house was otherwise "secured", Conant proceeded to search the whole house. He found two plastic bags of suspected narcotics under the bar in the basement. When Conant returned, defendant again indicated upon questioning that he was the owner of the house and lived there. Defendant was then placed under arrest and searched. Suspected heroin was found in his pocket. All of the other persons in the house were also searched, but there is no indication that anything was found on their persons. Laboratory tests revealed that the envelope found in defendant's pocket contained 8.5 grams of heroin.

"A. I did not know what he was going to do.

* * *

"A. No, I did not. After we gained entry Patrolman Lehman told me to bring him on inside.

"Q. All right. You took him on inside?

"A. I did.

"Q. Now when you went inside, what did you do immediately after you got inside?

"A. Well I was in the living room with Mr. Summers.

"Q. All right. You kept Brother Summers right close to you, is that right.

"A. He was there.

"Q. All right. What did you do after you kept him in your close view like that; did you ever go anyplace else in the house?

"A. Not until after the house was secured, then I went to the basement."

Defendant was charged only with possession of the 8.5 grams of heroin found concealed on his person. Consequently, when the search was ruled illegal and the evidence suppressed, the charges against defendant were also dismissed. The prosecutor on appeal contends that defendant was properly searched.

The prosecutor makes three arguments to justify the search of defendant's person. First, the prosecutor argues that the search warrant authorized a search of the "premises", and that all hiding places located inside the house are part of the "premises". Secondly, the prosecutor claims that, even if this was not strictly a "premises search", a person found in the house when the search warrant is issued can in some cases be searched. A search was justified here because of defendant's presence on the premises, his ownership of the premises, and the reasonable expectation that an item sought would be found on his person. Finally, the prosecutor argues that the police had probable cause to arrest defendant when they found a controlled substance in the property owned by him. The search is then justified as incident to that arrest. We reject all of these legal bases for the search, and affirm the trial court.

The prosecutor's first legal theory is based upon MCLA 780.651; MSA 28.1259(1), which authorizes a magistrate to issue a warrant to search any "house, building or other location or place where the property or thing which is to be searched for and seized is situated". The argument goes as follows: Since the clothing of the defendant is a "place where" heroin could be located, the trial judge must have intended to allow a search of the same pursuant to his warrant for the "premises".

The prosecutor misses the point of the statute. MCLA 780.651; MSA 28.1259(1) only authorizes a magistrate to issue warrants to search certain places.

Once a warrant has actually been issued, it cannot be broadly interpreted. A search warrant must describe the premises to be searched and the property to be seized with particularity, and the executing officers must narrowly follow that description, Marron v United States, 275 US 192, 196; 48 S Ct 74, 76; 72 L Ed 231, 237 (1927), People v Franks, 54 Mich App 729; 221 NW2d 441 (1974). It is true that the magistrate could have issued a warrant to search any individual found on the premises, but he did not do so. The "particularity" requirement prevented the police officers from legally extending the scope of the warrant so as to authorize a search of defendant's person.

The Prosecutor argues in the alternative that the courts of other states have allowed the search of individuals found on the premises to prevent the complete frustration of the warrant. Otherwise, it is claimed, occupants would simply conceal contraband upon their person as the police announce their presence. Applying the test found in those cases, the prosecutor states that there was "reasonable cause" for the police to believe defendant had upon his person property subject to the warrant. Particular accent is put on defendant's presence on the scene and his ownership of the house.

Our courts have never explored the extent to which persons found upon the premises as a search warrant is executed can be searched without another warrant. This is not the occasion to decide that issue, for all of the cited cases require at the very least presence upon the premises being searched. That factor cannot be found here. The defendant was stopped outside of the house. There hardly could be any items on his person which were subject to the search warrant, since the items too were outside the designated premises. Taking defendant back inside did not change the situation. Even if the police acted legally in doing so, an issue we do not decide here,

failure to search defendant's person certainly would not "frustrate" the execution of the warrant. There could be little fear that items in the house would be taken and concealed by defendant, who was being detained and watched by Officer Conant.

The prosecutor's final claim is that the police had probable cause to arrest defendant for possession of the narcotics found in the basement of the house. If that contention is true, then the police properly searched the person of defendant incident to that arrest. The trial judge, however, ruled that the police lacked probable cause to arrest the defendant. He found People v Davenport, 39 Mich App 252; 197 NW2d 521 (1972), to be controlling here, and we agree.

In Davenport, police officers went to a house where defendant resided with three other persons for the purpose of executing a search warrant for those premises. As the police broke down the door to gain entry, they observed the defendant running upstairs with a small box. The police reached an upstairs bathroom in time to retrieve three envelopes and a bit of loose marijuana as the defendant attempted to flush them down the toilet. Marijuana was also found in those envelopes. A search of the whole house was then conducted, and a bag of narcotics paraphernalia and .26 grams of heroin were found in the basement. Both items were at the bottom of a barrel of soiled clothes, and the heroin was contained in a prescription bottle, bearing defendant's name, for another, non-narcotic drug.

The Court in Davenport held that there was insufficient evidence to support a jury verdict convicting Davenport of possession of the .26 grams of heroin. Judge, Now Justice Levin, writing for the Court, expressed the reasoning of the panel as follows:

"Davenport cannot be convicted on the theorem that someone must have been in possession of the heroin.

"Davenport's residence in the house and the presence in the bag of a plastic bottle carrying a label bearing his name were the only evidence connecting him to the heroin found in the brown bottle. Four persons lived in the house. It is not reasonable to infer from the fact that Davenport was one of the occupants that he--rather than Phillips or Brown or Green--was the person who placed the capsules in the brown bottle. In addition to the plastic bottle labeled with Davenport's name, there were two plastic bottles bearing the name of one of the other residents. Ardis Phillips. There was no evidence that the brown bottle, the bag, or the barrel belonged to Davenport. Clearly there were innocent theories--unrebutted by any evidence--which accord with the facts. It is as likely that Ardis Phillips or anyone else living in the house, who would have had equal access to the basement, was in possession of the heroin.

"More than mere association must be shown to establish joint possession. 'An additional independent factor linking the defendant with the narcotic must be shown.' " 39 Mich App 252, 256-257. (Emphasis supplied, footnotes and citations omitted.)

While the Court found there to be sufficient evidence to find defendant guilty beyond a reasonable doubt of possession of the marijuana, a general verdict required reversal.

Davenport stands for the proposition that joint control of a dwelling house is insufficient to sustain a conviction for knowingly possessing an illicit drug contained therein without some further evidence connecting the defendant with that drug. The prosecutor accurately points out that Davenport was directly concerned with guilt beyond a reasonable doubt, while the present situation involves the lesser "probable cause" standard. However, the principles of Davenport still apply.

In assessing probable cause, the quantum of proof is different, but there still must be some evidence of the type or quality necessary to support a conviction. That concept was well stated by Justice Levin in his dissenting opinion to People v Smith, 49 Mich App 630, 630-640; 212 NW2d 768 (1973), rev'd on other grounds, 393 Mich 432; 225 NW2d 165 (1975), in the context of an arrest for carrying a concealed weapon:

"The majority apparently agree that the evidence is insufficient to convict Smith, but hold that it is adequate to support the binding-over decision. The standard of jury persuasion is indeed higher than the standard which guides the magistrate. But we are not concerned with the weight to be given an inference in assaying guilt or innocence, but rather with a question of law: Should the trier of fact be permitted to infer from the evidence that Smith was carrying a concealed weapon? If the answer to that question is, as I believe, that the trier of fact should not be permitted to draw that inference, then the people have failed to establish an element of the offense." (Emphasis supplied.)

There must be at least some evidence of an additional independent factor linking the defendant with drugs found on the premises, although the weight to be given to the factor need be less to support an arrest.

That concept is illustrated by Johnson v United States, 333 US 10; 68 S Ct 367; 92 L Ed 436 (1948). In that case, a Seattle police narcotics officer received information that unknown persons were smoking opium in the Europe Hotel. Federal narcotics agents were called and accompanied the Seattle police officer to the hotel. A strong odor of burning opium was detected outside room number 1. The agents knocked, and a voice inside inquired as to who was there. The police officer identified himself, and there was a slight delay during which noise was heard in the room. Defendant opened the door, and the police officer told

defendant he wanted to talk to her. She acquiesced and admitted the officer. Defendant, found to be the sole occupant of the room, was "arrested" and the room was searched. Opium and smoking apparatus were found.

Although the defendant clearly had at least joint control of the premises and drugs were determined to be present there, the Supreme Court held that no probable cause existed to support her arrest. The required additional factor, that she was the sole occupant of the room, was not discovered until after the defendant was arrested:

"The Government, in effect, concedes that the arresting officer did not have probable cause to arrest petitioner until he had entered her room and found her to be the sole occupant. It points out specifically, referring to the time just before entry, 'For at that time the agents did not know whether there was one or several persons in the room. It was reasonable to believe that the room might have been an opium smoking den.' And it says, ' * * * that when the agents were admitted into the room and found only petitioner present they had a reasonable basis for believing that she had been smoking opium and thus illicitly possessed the narcotic.' Thus the Government quite properly stakes the right to arrest, not on the informer's tip and the smell the officers recognized before entry, but on the knowledge that she was alone in the room, gained only after, and wholly by reason of, their entry of her home. It was therefore their observations inside of her quarters, after they had obtained admission under color of their police authority, on which they made the arrest.

"Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do." 333 US 10, 16, 17. (Footnotes omitted.)

Johnson, then, indicates that the quality of the evidence must be examined in making the probable cause determination.

Certain additional factors found to be sufficient to link the defendant to drugs found on the premises reappear frequently in the cases. These include: (1) attempted flight and destruction of the evidence by the defendant, People v Davenport, supra, (2) close proximity to the narcotics, People v Davenport, supra, 256, fn 4; Ker v California, 374 US 23, 36, 37; 83 S Ct 1623; 10 L Ed 2d 726 (1963), Commonwealth v Anderson, 224 Pa Super 19, 23; 302 A2d 504, 506 (1973), (3) the existence of reliable information that defendant is trafficking in drugs of the type found in plain view, Davis v United States, 327 F2d 301 (CA 9, 1964), (4) the linking of defendant directly to the specific property in which the drugs are found, such as through his admission of its ownership, Carlo v United States, 286 F2d 841 (CA 2, 1961), cert den, 366 US 944; 81 S Ct 1672; 6 L Ed 2d 855 (1961), and (5) knowledge by the defendant of the precise location of the drugs, People v Davenport, supra, 256, fn 4. There are undoubtedly other proper factors, but these are the ones most frequently appearing.

In the instant case, none of those additional factors were present. Defendant was known to be the owner and an occupant of the house, and drugs were found in an out-of-the-way place in that house. However, there was no other evidence linking defendant to those drugs at the time of his arrest. We have the same set of facts as described in Davenport--mere joint occupancy by the defendant with others of a dwelling in which illegal drugs are located. It is certainly "as likely" that Dwight Calhoun, or one of the other persons on the premises, placed those drugs in the basement.

Under those circumstances, we must hold that the police officers had no probable cause to arrest

defendant for knowingly possessing the drugs found in the basement of his house. The seizure of the heroin involved here cannot be justified as the product of a search incident to arrest. Since the other possible legal bases for the search have also been rejected, we must uphold the decision of the trial judge suppressing the evidence and quashing the information.

Affirmed.

M. F. Cavanagh, J., concurred.

Bashara, J. (dissenting). I respectfully dissent from my Brothers' opinion. I believe there was probable cause to arrest the defendant, and that the search of his person was a lawful search incident to an arrest.

In Michigan a peace officer may arrest a person without a warrant "when he has reasonable cause to believe that a felony has been committed and reasonable cause to believe (that) such person has committed it". MCLA 764.15(d); MSA 28.874(d). Each case must be analyzed in light of the peculiar circumstances facing the officer. Wong Sun v United States, 371 US 471, 479; 83 S Ct 407; 9 L Ed 2 d 441 (1963), People v Orlando, 305 Mich 686, 689; 9 NW2d 893 (1943).

Case law teaches that the police officer makes his determination as to whether the person arrested has committed a felony not as a legal scholar, but as a man of reasonable prudence and caution. People v Harper, 365 Mich 494, 501; 113 NW2d 808 (1962), cert den 371 US 930; 83 S Ct 302; 9 L Ed 2 d 237 (1962). Likewise, Draper v United States, 358 US 307, 313; 79 S Ct 329; 3 L Ed 2 327 (1959), recognized that in assessing probable cause one deals in "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

In the instant case the police were armed with a warrant to search the premises at 9356 Mansfield for narcotics. This indicates the police were aware of narcotics activity taking place at that address.

On entry to the home the police immediately arrested one Calhoun who had attempted to discard a "pack" of heroin. A search of the premises uncovered more heroin in a common area of the home. At that point, although there were approximately six other citizens in the house, the police arrested only the defendant, who had previously admitted that he lived there and was the owner. It was reasonable for the police to infer that he controlled the premises as well as any heroin found there. See People v Hintz, 62 Mich App 196; 233 NW2d 228 (1975).

It is my opinion that the majority has analyzed probable cause under the wrong standard. It is important to remember that a policeman is not a lawyer. He need not analyze the elements of the offense to determine whether there is sufficient evidence to convict. Wong Sun v United States, supra. This is clearly the function of the courts. See People v Davenport, 39 Mich App 252; 197 NW2d 521 (1972).

My Brothers' reliance on People v Davenport, supra, is misplaced. In Davenport, Justice (then Judge) Levin determined there was insufficient evidence to find the defendant guilty beyond a reasonable doubt of possession of narcotics. The drugs were discovered in a common area of a house which was under the joint control of a number of persons including the defendant. This does not mean there was no probable cause to arrest. The quantum of proof needed to convict is greater than that required for probable cause to arrest. Justice (then Judge) Levin recognized the difference in People v Degraffenreid, 19 Mich App 702, 708 n 2; 173 NW2d 317 (1969), when he stated:

"While mere presence, even with knowledge that a criminal offense is about to be or is being committed, is not enough to support a conviction of a person as an aider or abettor under the statute * * * such presence is enough to establish probable cause justifying an arrest." (Citations ommitted.)

Finally, I cannot agree that Johnson v United States, 333 US 10; 68 S Ct 367; 92 L Ed 436 (1948), is dispositive. In that case the government argued that probable cause existed to arrest once the police discovered the petitioner was the sole occupant of the room. The United States Supreme Court in a five to four decision held that the police illegally gained entrance to the room under color of police authority. Therefore, the arrest could not be justified by any facts that occurred after they gained entrance. The Court did not reach the issue of whether probable cause to arrest existed where petitioner was the sole occupant of a room where narcotics were found. Nor did it reach the crucial issue of the instant case, as to whether there would have been probable cause to arrest had there been more than one occupant in the room.

I would reverse the trial judge and reinstate the charges against the defendant.

Appendix B

People v Summers

Docket No. 58465. Argued October 5, 1978 (Calendar No. 10).--Decided December 27, 1979.

#10/October 1978

STATE OF MICHIGAN
SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,
v No. 58465
GEORGE SUMMERS,
Defendant-Appellee.

BEFORE THE ENTIRE BENCH

BLAIR MOODY, JR., J.

On October 10, 1974, a team of Detroit police officers was dispatched to execute a warrant to search premises located at 9356 Mansfield. The warrant was issued to search the premises and seize heroin and any other narcotics materials and paraphernalia, but did not specify persons to be searched. The owner of the premises was not named in the search warrant. The only reference to a particular person was a statement contained in the warrant indicating that the informant had previously purchased heroin at the Mansfield address from a black male known as "George".

Upon arriving at the named address, Officer Roger Lehman saw the defendant go out the front door of the house and proceed across the porch and down the steps. When defendant was asked to open the door he replied that he could not because he left his keys

inside, but he could ring someone over the intercom. Dwight Calhoun came to the door, but did not admit the police officers. As a result, the officers obtained entrance to the premises by forcing open the front door. Once admittance had been gained Officer Lehman instructed Officer Conant, previously stationed along the side of the house, to bring the defendant, still on the porch, into the house.

After the eight occupants of the house were detained, a search of the premises revealed two plastic bags of suspected narcotics under the bar in the basement. After finding the suspected narcotics in the basement and upon determining that the defendant was the owner of the house, Officer Conant formally arrested the defendant for violation of the Controlled Substances Act of 1971. MCL 335.341(4)(a); MSA 18.1070(41)(4)(a). A custodial search conducted by Officer Conant revealed a plastic bag containing suspected heroin in the defendant's jacket pocket. It is this heroin, discovered on the person of the defendant, that forms the basis of the instant possession charge.

Following a preliminary examination, defendant was bound over for trial. On November 19, 1974, the trial court granted a motion to suppress the evidence and quashed the information. Subsequently, the Court of Appeals affirmed the trial court. 68 Mich App 571; 243 NW2d 689 (1976). We granted leave to appeal on February 8, 1977. 399 Mich 838 (1977).

The dispositive issue presented for resolution is whether the police officers had probable cause to arrest the defendant without a warrant when defendant was seized and detained while leaving his home prior to execution of the premises search warrant.

Statutory authority for an officer to arrest without warrant is set forth in MCL 764.15; MSA 28.874, which provides in relevant part:

"Any peace officer may, without a warrant, arrest a person --

* * *

"(d) When he has reasonable cause to believe that a felony has been committed and reasonable cause to believe that such person has committed it."

Probable cause for an arrest has been defined as any facts which would induce a fair-minded person of average intelligence and judgment to believe that the suspected person has committed a felony. People v Ward, 226 Mich 45; 196 NW 971 (1924). Furthermore, the facts upon which such belief is based must be present at the moment of arrest. People v Stewart, 232 Mich 670; 206b NW 337 (1925).

Therefore, in reviewing a claim that a police officer lacked probable cause to arrest, the reviewing court must determine whether facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected person had committed a felony. Each case must be analyzed in light of the particular facts confronting the arresting officer. People v Harper, 365 Mich 494; 113 NW2d 808 (1962).

According to the facts, defendant had left the premises before the search party arrived and was proceeding down the front porch steps when approached by Officer Lehman. At that point in time, Officer Lehman detained the defendant for purposes of limited inquiry and ascertained that the defendant lived at the named premises. There is no evidence that a frisk of the defendant was made. Defendant's behavior pursuant to the police officer's request for admittance to the premises can be categorized only as cooperative.

However, the testimony of Officer Conant at the preliminary examination indicates that the defendant was not free to leave the front porch as the premises

search warrant was being executed, but was instead escorted into his house and deprived of his liberty.[1] At that time the initial inquiry and cooperative response terminated. This further detention of the defendant, by bringing him into the house, was a "seizure" as defined by the United States Supreme Court:

"Obviously, not all personal intercourse betweeen policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry v Ohio, 392 US 1, 19, fn 16; 88 S Ct 1868; 20 L Ed 2 889 (1968).

We conclude that the seizure of defendant, unsupported by probable cause, was violative of the Fourth Amendment.

The standard for determining whether a police officer's seizure-detention of a citizen violates the Fourth Amendment is clearly set forth by the United States Supreme Court in the recent decision of Dunaway v New York, ____ US ____; 99 S Ct 2248; 60 L Ed 2 d 824 (1979). Justice Brennan's majority opinion holds that detention of a citizen beyond the narrow scope of Terry v Ohio, supra, and its progeny, is reasonable only if supported by probable cause for arrest. Thus, the general standard for determining whether a seizure-detention is legal is not whether the police officer's actions were reasonable under the circumstances but rather whether the police officer had probable cause to arrest.

In Dunaway, the Court explained that prior to the Terry decision arrests were equated with seizures requiring probable cause to justify the intrusion under the Fourth Amendment:

"Before Terry v Ohio, 392 US 1 (1968), the Fourth

Amendment's guarantee against unreasonable seizures of persons was analyzed in terms of arrest, probable cause for arrest, and warrants based on such probable cause. The basic principles were relatively simple and straightforward: The term 'arrest' was synonomous (sic) with those seizures governed by the Fourth Amendment. While warrants were not required in all circumstances, the requirement of probable cause, as elaborated in numerous precedents, was treated as absolute. The 'long prevailing standards' of probable cause embodied 'the best compromise that has been found for accommodating the ( ) often opposing interests' in 'safeguard(ing) citizens from rash and unreasonable interferences with privacy' and in 'seek(ing) to give fair leeway for enforcing the law in the community's protection'. Brinegar v United States, 338 US 160, 176 (1949). The standard of probable cause thus represented the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest 'reasonable' under the Fourth Amendment. The standard applied to all arrests, without the need to 'balance' situations." (Footnotes omitted.) Dunaway, Slip opinion, pp 6-7.

The exception to this general rule was carefully carved out in the Terry opinion:

"Terry for the first time recognized an exception to the requirement that Fourth Amendment seizures of persons must be based on probable cause. That case involved a brief, on-the-spot stop on the street and a frisk for weapons, a situation that did not fit comfortably within the traditional concept of an 'arrest'. * * * (T)he Court established 'a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime'. * * * Terry departed from traditional

Fourth Amendment analysis in two respects. First, it defined a special category of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test. Second, the application of this balancing test led the Court to approve this narrowly defined less intrusive seizure on grounds less rigorous than probable cause, but only for the purpose of a pat-down for weapons." (Footnotes omitted.) Dunaway, Slip opinion, pp 7-8.

The Dunaway Court clearly indicated its intent to maintain the narrow scope of Terry. The Court expressly reaffirmed the essential viability of the probable cause standard and specifically refused to expansively apply the Terry balancing test:

"In effect, respondents urge us to adopt a multifactor balancing test of 'reasonable police conduct under the circumstances' to cover all seizures that do not amount to technical arrests. But the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when the balancing may be done in the first instance by police officers engaged in the 'often competitive enterprise of ferreting out crime'. Johnson v United States, 333 US 10, 14 (1948). A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront. Indeed, our recognition of these dangers, and our consequent reluctance to depart from the proven protections afforded by the general rule, is reflected in the narrow limitations emphasized in the cases employing the balancing test. For all but those narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable'

only if supported by probable cause." (Footnotes omitted.) Dunaway, Slip opinion, pp 12-13.

In describing the nature of the narrow intrusions sanctioned under a Terry test, the Court stressed that a permissible intrusion is restricted to brief questioning regarding suspicious activity and to limited weapons frisks necessary to insure safety:

"Because Terry involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope. Terry itself involved a limited, on-the-street frisk for weapons. Two subsequent cases which applied Terry also involved limited weapons frisks. See Adams v Williams, 407 US 143 (1972) (frisk for weapons on basis of reasonable suspicion); Pennsylvania v Mimms, 434 US 106 (1977) (order to get out of car is permissible 'de minimis' intrusion after car is lawfully detained for traffic violations; frisk for weapons justified after 'bulge' observed in jacket). United States v Brignoni-Ponce, 422 US 873 (1975), applied Terry in the special context of roving border patrols stopping automobiles to check for illegal immigrants. The investigative stops usually consumed less than a minute and involved 'a brief question or two'. Id., at 880. The Court stated that '(b)ecause of the limited nature of the intrusion, stops of this sort may be justified on facts that do not amount to the probable cause required for an arrest. Ibid. See also United States v Martinez-Fuerte, 428 US 543 (1976) (fixed checkpoint to stop and check vehicles for aliens); Delaware v Prouse, ____ US ____ (1979) (random checks for drivers' licenses and proper vehicle registration not permitted on less than articulable reasonable suspicion).

* * *

"Indeed, Brignoni-Ponce expressly refused to extend Terry in the manner respondent now urges. The Court there stated: 'The officer may question the driver and passengers about their citizenship and

immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause'. Id., at 881-882. * * * Accord, United States v Martinez-Fuerte, supra, 428 US at 567." (Footnotes omitted.) (Emphasis changed.) Dunaway, Slip opinion, pp 8-11.[2]

Applying Dunaway to the specific facts of this case, the seizure of defendant on the porch and his subsequent detention were not, by nature, limited intrusions permissible under Terry and subsequent cases. Clearly these facts do not involve the special context of border patrol interrogations or traffic infractions. The defendant was stopped and questioned in front of his home. He answered the inquiries and attempted to assist the officers to gain entrance to the premises. The defendant's conduct at no time gave a basis for the officers to suspect unlawful activity on his part or to fear for their safety. Indeed, the officers chose not to frisk the defendant. This initial stop and brief questioning was completed. At that point, the officers had exhausted any Terry basis to further restrain the defendant.

When the defendant's liberty was thereafter restrained, the police officers must have had probable cause to arrest the defendant to render the seizure-detention reasonable under the Fourth Amendment. To sanction a further detaining of defendant without probable cause would in effect replace the fundamental and essential probable cause standard with a multifactor balancing test specifically rejected by the United States Supreme Court in Dunaway.

Although not formally arrested until after the suspected heroin was discovered in the basement, the defendant was for all practical purposes arrested without a warrant when he was "seized" on his front porch, at a time when the police officers did not have

probable cause to believe that the defendant had committed or was committing a felony.[3] The heroin seized from defendant, constituting the "fruits" of his unlawful arrest, must be excluded. Wong Sun v United States, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963). Accordingly, the trial court's suppression of the evidence in the instant case is affirmed.

/s/ Blair Moody, Jr.
/s/ Charles L. Levin
/s/ Thomas Giles Kavanagh
/s/ James L. Ryan

FOOTNOTES

1

"Q (MR. MITCHELL, DEFENSE COUNSEL) All right. Well when you came around to the front of the house you did see -- you did see Mr. Summers, is that right?

"A (OFFICER CONANT) I did.

"Q And Mr. Summers was outside of the house, is that right?

"A He was.

"Q Now Mr. Summers was outside of the house, and you took him back in the house, is that right?

"A I did.

"Q Now he wasn't a member of your crew, was he?

"A No, he was not.

* * *

"Q You didn't see anybody. Did you ever lift him up and bring him back up on the porch as he was knocked down?

"A No, I did not. After we gained entry Patrolman Lehman told me to bring him on inside.

"Q All right. You took him on inside?

"A I did.

"Q Now when you went inside, what did you do immediately after you got inside?

"A Well I was in the living room with Mr. Summers.

"Q All right. You kept Brother Summers right close to you, is that right?

"A He was there.

"Q All right. What did you do after you kept him in your close view like that; did you ever go anyplace else in the house?

"A Not until after the house was secured, then I went to the basement."

2

Most recently, in a case subsequent to Dunaway, the United States Supreme Court again steadfastly refused to broaden the scope of an intrusion permissible under Terry. Ybarra v Illinois, ____ US ____; ____ S Ct ____; ____ L Ed 2d ___; 48 LW 4023 (11/28/79). The primary issue presented for resoution in Ybarra was whether the search of a person who was present in a tavern during the execution of a search of the premises was justified under the Terry test as a frisk or was supported by probable cause. The Court reiterated that the Terry exception should be applied in the limited circumstances of a frisk for weapons by an officer who has reason to believe the individual confronted is "armed and presently dangerous".

3

In Ybarra v Illinois, ____ US ____; ____ S Ct ____; ____ L Ed 2d ___; 48 LW 4023, 4025 (11/28/79), the Supreme Court stressed that when determining whether probable cause existed to search or seize a person, the focus of the inquiry is upon the activities of the individual confronted:

"Not only was probable cause to search Ybarra absent at the time the warrant was issued; it was still absent when the police executed the warrant. Upon entering the tavern, the police did not recognize Ybarra and had no reason to believe that he had committed, was committing or was about to commit any offense under state or federal law. Ybarra made no gestures indicative of criminal conduct, made no movements that might suggest an attempt to conceal contraband, and said nothing of a suspicious nature to the police officers. In short, the agents knew nothing in particular about Ybarra, except that he was present, along with several other customers, in a public tavern at a time when the police had reason to

believe that the bartender would have heroin for sale.

"It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed. But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Sibron v New York, 392 US 40, 62-63. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" of persons, not places. See Rakas v Illinois, 439 US 128, 138-143, 148-149; Katz v United States, 389 US 347, 351-352." (Footnote omitted.) (Emphasis added.)

Appendix C 10/October 1978

STATE OF MICHIGAN
SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,
v No. 58465
GEORGE SUMMERS,
Defendant-Appellee.

BEFORE THE ENTIRE BENCH

WILLIAMS, J. (For Reversal)

We granted leave to appeal in this case to determine the constitutional validity of a search of defendant and the seizure pursuant thereto of a plastic bag of heroin from defendant's jacket pocket. The ultimate permissibility of this search and seizure, however, rests in turn on whether two prior "seizures" of defendant's person were constitutional: (1) the police bringing defendant, who had just left his house, from his outdoor porch into his house and his detention therein while a valid premises search warrant for heroin and any other narcotic materials and paraphernalia was executed, and (2) the formal arrest of the defendant, based upon his ownership-occupancy of the premises named in the warrant, following the discovery of suspected narcotics in the basement of his house.

Considered within the totality of circumstances in this case, we find that neither of these prior "seizures" of defendant contravened the general proscription against unreasonable seizures[1] of either the Fourth Amendment to the federal constitution US Const, Am IV, or this state's constitution, Const 1963, art 1, § 11. Bringing defendant inside from his porch and then detaining him therein while the premises search

warrant was being executed was "reasonable" police action in this case. Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Defendant's arrest inside after suspected narcotics were found in his basement pursuant to the search warrant was valid because it was based on probable cause. Accordingly, we hold that the ensuing seizure of the heroin from defendant's person was constitutionally permissible as the product of an allowable search incident to a valid arrest. See Chimel v California, 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969). We therefore reverse the Court of Appeals affirmance of the trial court's suppression of the heroin seized from defendant's person and its quashing of the information.

I. FACTS

Because the factual setting of a specific search or seizure is usually of paramount importance in determining the constitutional validity of that search or seizure, we take careful pains to delineate the particular circumstances of this case which we feel, viewed in their totality, sanction the police conduct in question.

On the evening of October 10, 1974, a team of Detroit police officers was sent to 9356 Mansfield in the City of Detroit to execute a premises search warrant for heroin and any other narcotic materials and paraphernalia. The warrant was supported by information from an informant who had purchased heroin at this same address just the day before.

Upon arriving at the premises named in the warrant, police officers Lehman and Conant witnessed defendant leave the premises to be searched through the front door and proceed down the front porch steps. At this point Officer Lehman approached defendant, identified himself as a police officer, and asked defendant if he lived in the house he had just exited. Upon defendant's affirmative response,

Officer Lehman showed the search warrant to him and told him to open up the house if he could. Defendant, since he had left his keys inside, cooperated with this request by using the intercom to summon someone inside the house to open the door.

Dwight Calhoun opened the inner door to the house in response to defendant's request. Officer Lehman then identified himself as a police officer and told Calhoun to open the door. Calhoun did not comply with this direction, so Officer Lehman attempted to open the storm door only to discover that it was locked. At that time, Calhoun slammed the inner door shut in Officer Lehman's face. Thereupon Officer Lehman instructed three other officers who were present to break down the door. Once admittance had been gained, Officer Lehman instructed Officer Conant, previously stationed along the side of the house, to bring defendant, still on the porch, into the house.

In order to secure the premises prior to the search, defendant and the other persons in the house were taken into the living room by the police officers and were detained there while the search was conducted.

In the course of the search, two plastic bags containing suspected narcotics were found in the basement. Thereafter, defendant, who was by then known to be the owner of the house, was arrested. A custodial search following this arrest revealed a plastic bag containing suspected narcotics in defendant's jacket pocket. It is these narcotics, later determined to be heroin, which form the basis for the instant charge of violation of the Controlled Substances Act of 1971. MCL 335.341(4)(a); MSA 28.1070(41)(4)(a).

Following a preliminary examination, defendant was found over for trial. However, on November 19,

1974, the trial court granted defendant's motion to quash the information because it held the heroin to have been improperly seized from defendant. This finding was predicated upon both the trial court's belief that no probable cause existed to arrest defendant and the fact that defendant was not present in the house voluntarily.

The Court of Appeals affirmed the trial court for basically the same reasons. 68 Mich App 571; 243 NW2d 689 (1976).

We granted leave to appeal on February 8, 1977. 399 Mich 828 (1977).

II. DUNAWAY AND TERRY

There can be no question that the police "seized" defendant when they required him to go back inside his house and remain there during the execution of the legal search warrant.[2] Terry, supra, 19, fn 16. Such a determination, however, far from ends our inquiry into the constitutional permissibility of the police action in question. The United States Supreme Court has taught us that " '(s)earch' and 'seizure' are not talismans". Terry, supra, 19. Thus just as the Court in Terry was quick to reject the notion that the Fourth Amendment does not come into play at all as a limitation upon police conduct just because an officer may stop short of something called a "technical arrest", Id., 19, so must we be wary of erring in the reverse manner by uncritically labeling a "seizure" an "arrest" and then characterizing it as "illegal" since it was made without probable cause. Rather, we must ask whether this "seizure" of defendant, under the circumstances of this case, was violative of the state and federal constitutional proscriptions against unreasonable seizures.

Because we recognize that the police did not have probable cause to arrest defendant at the time they

encountered him on his porch, his "seizure" there is valid only if it comes within the rule of Terry, supra, and its progeny. That rule, of course, permits certain "seizures" or "detentions" as "reasonable" under the constitutional prohibitions against "unreasonable searches and seizures", on facts that do not constitute probable cause to arrest.[3] However, in order to properly understand the scope of the rule of Terry and its progeny, consideration must be given to the recent United States Supreme Court decision of Dunaway v New York, ____ US ____; 99 S Ct 2248; 60 L Ed 2d 824 (1979), which both recognizes the validity and indicates the limits of the Terry-and-progeny rule. In Dunaway the Court stated:

"Thus, Terry departed from traditional Fourth Amendment analysis in two respects. First, it defined a special category of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test. Second, the application of this balancing test led the court to approve this narrowly defined less intrusive seizure on grounds less rigorous than probable cause, but only for the purpose of a pat-down for weapons." Dunaway, supra, ____.

While Terry itself was a pat-down-for-weapons case, as was Adams v Williams, 407 US 143; 92 S Ct 1921; 32 L Ed 2d 612 (1972), others of the progeny are not. For example, Pennsylvania v Mimms, 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977), held a police order that a driver get out of his automobile a "de minimis" and reasonable intrusion after the car was lawfully detained for a traffic violation; United States v Brignoni-Ponce, 422 US 873; 95 S Ct 2574; 45 L Ed 2d 607 (1975), allowed roving border patrols to make investigative stops of automobiles to check for illegal immigrants on less than probable cause, i.e., on reasonable suspicion that a particular vehicle may contain aliens who are illegally in the country; United

States v Martinez-Fuerte, 428 US 543; 96 S Ct 3074; 49 L Ed 2d 1116 (1976), approved of fixed checkpoints to stop and check vehicles for aliens in the absence of any individualized suspicion. Indeed, Justice White's concurring opinion in Dunaway recognizes the wider application of Terry and its progeny as follows:

"The opinion of the Court might be read to indicate that Terry v Ohio, 392 US 1 (1968), is an almost unique exception to a hard-and-fast standard of probable cause. As our prior cases note, however, the key principle of the Fourth Amendment is reasonableness -- the balancing of competing interests. E.g., Delaware v Prouse, ____ US ____, ____ (1979); Michigan v Tyler, 436 US 499, 506 (1978); Marshall v Barlow's, Inc., 436 US 307, 321-322 (1978); United States v Martinez-Fuerte, 428 US 543, 555 (1976); United States v Brignoni-Ponce, 422 US 873, 878 (1975); Terry v Ohio, supra, at 20-21; Camara v Municipal Court of San Francisco, 387 US 523, 536-537 (1967)." Dunaway, supra, ____.

Close analysis of Dunaway and Terry and progeny suggests that basically there are four criteria to be considered in balancing to determine reasonableness:

First, was the police action taken in an atmosphere requiring rapid reaction to the exigencies encountered in the field such as the on-the-spot decision to stop and frisk suspicious individuals "casing" a store in Terry, or was the police action the result of a deliberate, planned decision such as the order to follow up an informant's lead by going out to "pick up a person" and "bring him in" for interrogation in Dunaway?

Second, was the police officer's belief in the necessity for action to protect the public peace and safety justified at its inception as where, for example, the careful surveillance by an experienced officer of the store "casings" in Terry warranted the officer in

believing the individuals might be contemplating a daylight robbery which it would be reasonable to assume would be likely to involve the use of weapons?

Third, was the "intrusion" on the individual's privacy by the police reasonably related in scope to the circumstances which justified the interference in the first place? In Terry the "intrusion" was limited to a pat-down for weapons during the investigation of suspicious behavior where the officer had reason to believe that he was dealing with armed and dangerous individuals; in Mimms, there was only a request to get out of a car following a lawful detention for a traffic violation; in Brignoni-Ponce the Court stated that a reasonable suspicion that a certain car contained illegal aliens would allow the officer to stop the car briefly and question the driver and passengers about their citizenship and immigration status, and ask them to explain suspicious circumstances; in Martinez-Fuerte there was merely a fixed checkpoint stop requiring a vehicle's occupants to respond to a brief question or two and perhaps produce a document evidencing a right to be in the United States. Visual inspection of the vehicle was limited to what could be seen without a search;[4] in Dunaway, on the other hand, the intrusion was severe. Not only was the defendant "picked up" in a neighbor's home, but he was subjected to custodial interrogation on the basis of mere reasonable suspicion.

Fourth, was the "seizure" reasonable in order to protect the officer's safety?[5] This criterion was stressed in Terry -- "the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. * * * American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded", Terry, supra, 23 -- and in Mimms -- "We think it too

plain for argument that the State's proffered justification -- the safety of the officer -- is both legitimate and weighty." Mimms, supra, 110.

In justifying a particular intrusion, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, meet these four criteria of "reasonableness". These facts, in turn, are to be subjected to the neutral scrutiny of a judge who must evaluate the "reasonableness" of a particular search or seizure in light of the particular circumstances. In making this assessment it is "imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Terry, supra, 21-22. In aplying these principles to the instant case we are acutely aware of the fact that, as one court put it,

"Whether an officer's conduct was 'reasonable' or 'appropriate' depends on the facts and circumstances of the particular case, so that the decision in one case seldom furnishes a pat answer in another case. A principle to be applied generally however is that in judging the reasonableness of the actions of the officer the circumstances before him are not to be dissected and viewed singly; rather they must be considered as a whole. So considered they are to be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." United States v Hall, 174 US App DC 13, 15; 525 F2d 857, 859 (1976) (citations omitted).

III. APPLICATION OF CRITERIA TO INSTANT CASE

A. Defendant's Transfer Inside From Porch

The action taken by the police in bringing defendant inside his house from the porch was a rapid,

in-the-field reaction to the perceived necessities of the situation and thus satisfies the first of the four criteria. Confronted with the possibility that an admitted inhabitant of a house where trafficking in drugs was allegedly conducted might escape to summon aid or himself interfere with the execution of the warrant, Officer Lehman made a quick, on-the-spot decision that the safety of the officers could be best protected by bringing defendant inside and keeping him under surveillance with the rest of the occupants of the house. The urgent and unanticipated circumstances surrounding the police action in the instant case bear not even the slightest resemblance to the deliberate decision to pick up the defendant in Dunaway and bring him down to the station house for interrogation. Rather, the decision to "seize" the defendant in the case at bar was made under necessitous circumstances akin to those in Terry.

As regards the second criterion -- the officers' belief in the necessity for action to protect the public peace and safety -- we believe the situation, when viewed as a whole, justified a "reasonable and cautious police officer" in taking the action which Officers Lehman and Conant took. They were possessed of a search warrant indicating that the premises they were about to search had been a place of drug traffic only one day earlier. The door abruptly slammed in the officer's face when he identified himself as a police officer reasonably confirmed the likelihood that illegal activities were being carried on in the premises. Furthermore, there was a reasonable nexus between defendant and the premises. Defendant had just left the house, had admitted he lived there, and his communication with those inside indicated a recognized relationship. The need for prudent and comprehensive action inherent in the fact that the main object of the search warrant was heroin, a white powder which can be easily secreted or destroyed, see State v Johnson, 102 RI 344, 354; 230 A2d 831, 836 (1967), justified not allowing defendant to run loose.

Further, we recognize the fact that armed violence not infrequently accompanies the use of or traffic in narcotics -- a fact well-known to the police. Cf., People v Nefzger, 173 Colo 199, 200-201; 476 P2d 995, 996 (1970).

Accordingly, we find the police belief in the necessity of action to have been justified at its inception. Like the police decision in Terry to seize an individual and pat his clothing down for weapons, we cannot say that the police decision to bring defendant inside "was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment * * *". Terry, supra, 28.

As for the third criterion, we believe that the scope of the intrusion of the officials under these circumstances was reasonable. Merely requiring defendant to cross his own threshold while the warrant was being executed was a narrow intrusion designed to ensure the officers' safety. It did not go beyond the kind of intrusion justified by the attendant safety concerns. Just as the officer in Mimms, supra, could constitutionally require an individual, based on general safety concerns, to get out of his car after a lawful stop even in the total absence of any articulable suspicion to suspect foul play from the particular driver at the time of the stop, a fortiori, we believe it was permissible for the police to require the defendant to enter his own house while the officers executed a valid search warrant in the face of numerous objective, observable facts to suport a reasonable concern for their safety. A law enforcement officer, when engaged in the performance of his or her duties, must act on a quick appraisal of the facts before him or her without the benefit of the hindsight which is usually possessed by those reviewing such actions. Sitting within the safe confines of our chambers, we decline to hold the police action in this case unwarranted. See People v Crawl, 401 Mich 1, 14; 257 NW2d 86 (1977) (opinion of Chief Justice, then Justice,

Coleman). On balance then, we find the important state interest in the officers' safety to outweigh this relatively minor intrusion into defendant's personal liberty.

Finally, we believe the fourth criterion to have been met. We think it beyond peradventure that the police in the instant case could have reasonably feared for their safety had they allowed defendant to remain at large outside the house while they were occupied within with the search warrant's execution. We must remember that Officer Lehman knew the defendant to be an occupant of this house in which the presence of narcotics was suspected and into which the police were required to force entry. Officer Lehman also knew that defendant was aware, at a minimum, that the police had come to his residence in search of something,[6] since Officer Lehman testified that he had shown the search warrant to the defendant. The person of reasonable caution could hardly be considered timorous in believing such a situation possesses violent potentialities. Such a person, under these circumstances, might quite logically fear for his or her own safety in executing a premises search warrant if that person knows that the individual permitted to move about freely outside the premises is aware that the object of the search, if found, could quite possibly be incriminating. The untended individual might alone or with summoned aid harm the police either while inside or on leaving.[7] As the Court in Terry states:

"a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime."

"The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be

warranted in the belief that his safety or that of others was in danger." Terry, supra, 26-27.

In sum, the four criteria having been satisfied, we find defendant's transfer to inside his house to have been "reasonable" and therefore constitutionally permissible.

B. Defendant's Detention Inside

Having found it "reasonable" in this case to bring defendant back across his threshold, we must next determine whether it was reasonable to keep him there. Although there is no Michigan case which specifically addresses the question of whether it is lawful for police officers to detain all persons found on certain premises during the execution of a search warrant for those premises, other courts have held such a detention legitimate. These courts reason that if individuals are left free to roam about the premises while the warrant is being executed, they could well destroy or carry off objects of the search. City of Olympia v Culp, 136 Wash 374, 377; 240 P 360, 361 (1925); State v Ryan, 163 Wash 496, 502; 1 P2d 893, 896 (1931); State v Valdez, 91 NM 567, 568-569; 577 P2d 465, 467 (Ct App, 1978). We agree. Indeed, the Federal First Circuit treated a challenge to such detention as "clearly frivolous" when it said,

"While appellant also contends that the search warrant (for the premises of his office) did not permit government agents to forcibly detain him, and that the restraint thereby imposed upon him prior to his actual arrest invalidated the warrant, we find these latter claims clearly frivolous." United States v Michell, 487 F2d 429, 430 (CA 1, 1973).

We also note that the safety rationale which justified bringing defendant inside his house in the first place would understandably continue to apply to his detention and surveillance once inside.[8]

IV. PROBABLE CAUSE TO ARREST DEFENDANT

With respect to the instant case, a police officer generally has probable cause to arrest, without a warrant, the known and present owner-occupant of premises wherein suspected narcotics are discovered pursuant to a valid premises search warrant. Probable cause to believe that a particular person has committed a particular offense is not the equivalent of guilt beyond a reasonable doubt. Thus the Court of Appeals reliance on People v Davenport, 39 Mich App 252; 197 NW2d 521 (1972), in finding that there was an insufficient nexus between the instant defendant and the narcotics seized in his house to provide probable cause for arrest, was misplaced. Davenport dealt with the insufficiency of mere joint occupancy of a house to convict one of four occupants of knowingly possessing narcotics found in the basement of the house, and not with probable cause to arrest. Thus the "seizure" of defendant -- his formal arrest -- inside his own house following the discovery of suspected narcotics in his basement (defendant having admitted that he owned the house) was constitutionally valid because it was based on probable cause.

V. CONCLUSION

Since we have found the "seizures" of defendant to be constitutionally permissible because they were "reasonable" under the circumstances of this case, the trial court erred in granting defendant's motion to quash the information and in suppressing the heroin found on defendant. Accordingly, we reverse the Court of Appeals affirmance of the trial court's ruling and remand the case to the trial court for further proceedings not inconsistent with this opinion.

/s/ G. Mennen Williams
/s/ Mary S. Coleman
/s/ John W. Fitzgerald

FOOTNOTES

1 US Const, Am IV provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Const 1963, art 1, § 11 provides, in pertinent part:

"The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation."

2

We do not find the police action in confronting defendant as he proceeded down his front porch steps a "seizure". The police, at this point, were simply seeking voluntary cooperation on defendant's part in gaining admission to his house. There was no apparent restraint of defendant's liberty. As the Supreme Court noted in Terry v Ohio, 392 US 1, 19, fn 16; 88 S Ct 1868; 20 L Ed 2d 889 (1968), "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons". Indeed, Justice Moody would categorize defendant's behavior pursuant to the police request for admittance as "cooperative".

3

See fn 1 for citation and text.

4

The Court stressed in both Brignoni-Ponce and Martinez-Fuerte that "any further detention or search must be based on consent or probable cause". Brignoni-Ponce, supra, 882; Martinez-Fuerte, supra, 567.

5

By the inclusion of this fourth criterion, we do not mean to imply that the lack of legitimate safety concerns on the part of a police officer will, ipso facto, render the police action "unreasonable" and therefore constitutionally impermissible where probable cause is lacking. In Brignoni-Ponce, supra, for example, it was the governmental concern over illegal immigrants, and not over a police officer's safety, which the Court found to outweigh the official interference with individual liberty involved in that case.

6

The preliminary examination did not reveal whether the defendant actually read the search warrant, thus finding out that the object of the search was narcotics, or whether he just knew the officers had the authority to search for something.

7

There are three reasons to distinguish the instant case from the recent case of Ybarra v Illinois, ___ US ___; 100 S Ct ___; ___ L Ed 2d ___; 48 LW 4023 (November 28, 1979): first, the existence of specific, articulable facts in the present case, supporting as reasonable, fear on the part of the officers for their safety, whereas the majority in Ybarra said "the State is unable to articulate any specific fact * * *", Ybarra, supra, slip opinion, p 7;

second, the intrusion on the instant defendant's privacy by requiring him to step over his own threshold was minimal compared with the pat-down and subsequent search in Ybarra; and third, the instant case deals with a private residence from which narcotics had been sold, whereas Ybarra involved a public tavern for the sale of liquor whose bartender reportedly possessed narcotics.

8

Since there is no evidence that the officers frisked defendant prior to his formal arrest, we have no occasion to consider whether such an action would have been reasonable under the circumstances. Cf. People v Nefzger, 173 Colo 199, 200-201; 476 P2d 995, 996 (1970).

Appendix C

People v Summers

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 29th day of February in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable Mary S. Coleman, Chief Justice, Thomas Giles Kavanagh, G. Mennen Williams, Charles L. Levin, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

Rehearing No. 13

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,
v No. 58465
GEORGE SUMMERS,
Defendant-Appellee.

In this cause a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

STATE OF MICHIGAN -- ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 29th day of February in the year of our

Lord one thousand nine hundred and eighty.

/s/ Corbin R. Davis
Deputy Clerk

No. 79-1794

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner

v.

GEORGE SUMMERS
Respondent

ON WRIT OF CERTIORARI TO
THE MICHIGAN SUPREME COURT

JOINT APPENDIX

WILLIAM L. CAHALAN
Prosecuting Attorney
County of Wayne
State of Michigan

EDWARD REILLY WILSON
Principal Attorney, Appeals

TIMOTHY A. BAUGHMAN
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5794

TABLE OF CONTENTS

	Page
Docket Entries	1
Preliminary Examination Transcript	3
Motion Transcript	52
Search Warrant and Affidavit	60
Search Warrant Return	62

DOCKET ENTRIES

1974	
October 14	Complaint and warrant filed.
October 16	Defendant arraigned on the warrant.
October 22	Defense motion to consolidate with No. 74-07989 for exam purposes only granted.
October 22	Preliminary examination held; defendant bound over for trial.
October 22	Waiver of arraignment on the information filed.
November 12	Motion to suppress evidence and dismiss case noticed for November 19.
November 19	Order suppressing evidence, quashing information and dismissing case filed.
1975	
January 17	Claim of Appeal filed.
March 19	Appellant's Brief, and Motion to Extend Time filed.
April 2	Motion to Extend Time granted by Court of Appeals.
July 24	Case noticed for submission.
1976	
April 26	Opinion affirming trial judge released by Court of Appeals.

Docket Entries

May 14	Application for Leave to Appeal filed.
1977	
February 8	Order granting Application for Leave to Appeal granted by Michigan Supreme Court.
1979	
December 27	Opinion affirming Court of Appeals released by the Michigan Supreme Court.
1980	
February 29	Rehearing denied.

PRELIMINARY EXAMINATION TRANSCRIPT

STATE OF MICHIGAN
IN THE RECORDER'S COURT
OF THE CITY OF DETROIT

THE PEOPLE OF THE STATE OF MICHIGAN,

-vs-

Case Number

74-07993

GEORGE SUMMERS,
Defendant.

PROCEEDINGS HAD AND TESTIMONY TAKEN upon the EXAMINATION in the above-entitled cause, before the HONORABLE HENRY HEADING, Judge of the Recorder's Court of the City of Detroit, on Tuesday, October 22, 1974.

APPEARANCES:

JOHN McCLOSKEY,
Assistant Prosecuting Attorney,
Appearing on behalf of the People.

ROBERT MITCHELL
Attorney-at-Law,
Appearing on behalf of the Defendant.

JOSEPH J. GONDOL
Official Court Reporter

INDEX

Witnesses	Direct	Cross	Redirect	Recross
Rogert Lehman	4	11	20	
Anthony Conant	23	28	38	
Stipulation	39			
Argument	41			
Motion to bind	54			
Opinion of the Court	55			

Detroit, Michigan
Tuesday, October 22, 1974
11:10 o'clock a.m.

- - -

THE CLERK: Case No. 74 07989, The People vs. Dwight Jerome Calhoun. The offense, violation of the state controlled substance act, knowingly and intentionally possessing heroin.

It's an Examination.

MR. MITCHELL: Now, your Honor, for purposes of Examination I would move to combine these two, 89 and 93. I think we could hear them both; the same facts, pretty much. For Examination only.

THE CLERK: Case No. 74 97993, The People vs. George Summers. The offense, violation of the controlled substance act, knowingly and intentionally possessing heroin.

MR. MC CLOSKEY: What did you just do, Bob?

MR. MITCHELL: Put them both together; it is the same thing.

(4) ROGER LEHMAN,
was called as a witness by the People, and having been first duly sworn by the Court Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MC CLOSKEY:

Q Tell the Court your name, please.
A Roger Lehman.
Q And what is your occupation, sir?
A A Detroit Police Officer.

Q Were you so employed on October 10th of this year, at around 10:10 p.m.?
A Yes, sir.
Q You were on duty at that time?
A Yes, sir.
Q And at that date and time did you have occasion to be in the vicinity of 9356 Mansfield?
A Yes, sir.
Q Would you tell the Court, please, what brought you to that particular address at that time?
A I went there to execute a search warrant.
Q All right. Would you tell the Court what occurred upon your arrival at that particular address?
A I approached the premises and had a conversation with the man (5) that just exited from the premises.
Q Officer, did you see him exit the premises?
A Yes, I did.
Q All right. Would you tell the Court the substance of that conversation?
A I identified myself as a police officer, and I asked this man if he lived there.
Q Did he respond to your —
A. Yes, he did.
Q — question?
A And at that time I showed him a copy of the search warrant; told him to open the house up if he could.
Q And did he in fact open up the house for you?
A No; he told me that he couldn't because he left his keys inside, he would have to ring and talk into a box and talk with somebody on the inside and have them open it up.
Q All right. What action did he take?
A He went to the porch and pushed a buzzer, and there is like a — like a PA system of some sort —

THE COURT: Hold it just a minute. Judge Gillis.

(Whereupon, a short recess was taken.)

THE COURT: Go ahead, Mr. Prosecutor.

Q (By Mr. McCloskey) Did anyone answer that — answer the door at that point, officer?
A (6) Well you could hear a voice come back over that system.
Q All right.
A George told him, "Hey, Dwight, let me in." Some words to that effect.
Q All right. And were you in fact let in?
A No. A short period of time had elapsed and the door was opened, and a person later identified as Dwight Calhoun was standing in the doorway.

I told him that I was a police officer, to open up the door.

He just stood there. So I attempted to open the storm door, and found it to be locked.

And at that time Dwight slammed the door shut in my face.

Q All right. This individual that you are referring to as Dwight, do you see him in the courtroom today?
A Yes, I do.
Q Would you point him out to the Court?
A He is seated at counsel's table, and he is across the table from Mr. Mitchell.

MR. MC CLOSKEY: All right. The record should reflect that the witness has pointed to and identified the defendant Dwight Jerome Calhoun, the defendant on File No. 74 07989.

Q (By Mr. McCloskey) All right. After the door — When the (7) door was slammed, officer, what action did you take?
A Well I stepped back, and there was three uniformed officers on the porch, I told them to knock the door in.

Q Did you force the door at that point then?
A Yes.
Q The individual that you have identified as Dwight Calhoun, did you identify yourself to him as a police officer?
A Yes, I did.
Q All right. Upon entering the premises, officer, what if anything did you observe?
A I pursued Mr. Calhoun into a bedroom downstairs.
Q Okay. Did you observe him do anything after he entered the bedroom?
A Yes. As I entered the bedroom a short few steps behind him, he tossed a pack onto the bed.
Q All right. Did you take any action with respect to that pack, officer?
A Yes. I subsequently retrieved that pack, and examined it and found it to contain what I believed to be heroin.

THE COURT: Do you see Mr. Calhoun in the courtroom?

THE WITNESS: Yes, your Honor, I do.

(8) THE COURT: Where is he?

THE WITNESS: He is seated at counsel table, across from Mr. Mitchell.

THE COURT: All right. What is he wearing?

THE WITNESS: He has on a, looks like a brown imitation leather waist-length jacket.

THE COURT: All right.

Q (By Mr. McCloskey) All right. Did you observe the contents of that envelope, officer?
A It was two plastic bags held together by a rubberband.

Q All right. Did you form any opinion as to contents?
A I believed it to be heroin.
Q And what did you do with the two plastic bags?
A I subsequently placed them into evidence.
Q All right. What lock — What did you — What number did you place that evidence on, officer?
A I would have to refer to my report.
Q All right, would you refresh your recollection?
A That lock-seal envelope would be 14-72629.
Q All right. Were any other individuals arrested in your presence on the premises?
A Yes, sir.
Q And were other individuals searched in your presence on the premises?
A (9) Yes, sir.
Q Do you see any of those other individuals here in court today?
A Yes, sir.
Q Would you point them out to the Court, please, and describe what they are wearing.
A George Summers, who is seated to the left of Mr. Mitchell, wearing a tan or a brown sweater.

MR. MC CLOSKEY: All right. The record should reflect he has pointed to and identified the defendant on File No. 74 07993 George Summers.

Q (By Mr. McCloskey) What, if anything, was confiscated from Mr. Summers in your presence?
A A plastic bag containing suspected heroin.

MR. MITCHELL: I would object to anything he got from Mr. Summers.

THE COURT: Why?

MR. MITCHELL: Well I don't know where he was when he got it from Mr. Summers. He said that he found something down in the downstairs bedroom in the presence of Mr. Calhoun.

THE COURT: Yes.

MR. MITCHELL: There has been no testify that Mr. Summers was down there at this point, or any — or whatever part of the house he was in.

(10) THE COURT: What were the facts and circumstances that caused you to get — What did you get and how did you get it?

THE WITNESS: With reference to Mr. Summers.

THE COURT: Yes. If you got anything.

THE WITNESS: Well, I didn't confiscate the pack from Mr. Summers personally, that was confiscated by Officer Conant, but I was in their presence when it was confiscated, and that was in the living room.

THE COURT: From his person?

THE WITNESS: That's correct.

THE COURT: All right. Go ahead.

Q (By Mr. McCloskey) So it's your testimony, officer, that your partner, Officer Conant, searched and confiscated from the defendant George Summers in your presence a certain amount of narcotics, is that correct?
A That is correct.
Q Suspected narcotics.
A That is correct.
Q All right. Who placed that on evidence, if you know?
A That — I put it — Well, that would be Officer Conant who put that pack on evidence.
Q All right.

MR. MC CLOSKEY: No further questions of witness.

(11) MR. MITCHELL: Is that the only witness you are going to call?

MR. MC CLOSKEY: I'm going to have to put Officer Conant on.

MR. MITCHELL: Then can he step outside for a moment?

MR. MC CLOSKEY: All right.

MR. MITCHELL: I thought you were only going to use the one officer.

MR. MC CLOSKEY: Well I was, but he didn't place this into evidence.

CROSS EXAMINATION

BY MR. MITCHELL

Q Now, Officer Lekman, tell me this: where was George Summers when you first saw him?
A Outside, exiting the premises.
Q Was it not true, officer, that you saw him outside exiting the premises, and that you — that he left and went somewhere, didn't he?
A No.
Q He didn't go anywhere?
A No.
Q He didn't go down to Greenfield and Chicago to a Clark Service (12) Station?
A Not at that time he didn't.
Q Not at that time he didn't

I'm talking about the time before you went into his house, that's the time I'm talking about.

Did he go down to a service station at that corner?

A No, he didn't. He couldn't have.
Q All right. Now then if he didn't go down there, then, of course, it would follow that you didn't put him in your car and take him back to the Mansfield address, is that right?
A That is correct.
Q And if that's true, then you don't remember pulling a gun on him and threatening hm and telling him to come back to Mansfield; you don't remember anything like that?
A No, sir, I don't.
Q Well when you got back to Mansfield you do remember being with him outside of the door, though, don't you? Huh?
A No, I wouldn't put it when I got back to Mansfield.
Q Well you do remember being outside of this address on Mansfield with George Summers, don't you?
A Yes, sir.
Q And you do remember at that time your telling him to open the door, is that right?
A Yes, sir, I did.
Q (13) You remember that, don't you?
A Yes, sir.
Q And you remember his telling you that he was not going to open the door, or some words to that effect, is that right?
A No, he didn't say he wasn't going to open the door.
Q He didn't tell you he wasn't going to.

Well he didn't open the door because you had to force the door open, isn't that correct?

A That's correct.
Q You had to use your battering ram, is that correct?
A That's right.
Q All right. Now tell me this, Mr. Lehman: you said you had a search warrant, is that right?

A Yes, sir.
Q Now you wouldn't have this phantom search warrant on your possession with you today, would you?

THE COURT: What kind of search warrant?

MR. MITCHELL: Phantom. We never saw it.

THE COURT: Oh. Oh, I see.

Q (By Mr. Mitchell) Do you have the search warrant with you today?
A I may have a copy in the file.
Q Well, do you have your file there with you?
A Yes, sir, I do.
Q Do you mind taking a look?
A (14) No, sir, not at all.
Q While you are looking, can you tell me when you served him with a copy of this search warrant was there anybody in the world present other than I think you said you showed a copy to Mr. Calhoun, was there anyone in the world present other than Mr. Summers and Mr. Calhoun?
A At which time?
Q At the time that you initially served him with a copy of the search warrant. I presume that was the time you were standing outside of the door before you used the battering ram.
A That's the time that I showed a copy to Mr. Summers.
Q Now did you in fact serve this copy of this search warrant on this man after you were in the house?
A Yes, sir, I did.
Q All right. All right. Now, officer, tell me this: when you got inside this — jumping over some of the facts — when you got inside the house did you — was there anyone else there besides you and Officer Conant?

A Yes, sir.
Q How many other — not giving me their names -- do you have their names listed anywhere, other than —
A The other officers from my crew names listed, not the uniformed officers, though.
Q All right. All right. Now here you are.
A Thank you.
Q (15) But now when you got inside the house how many people did you see inside this house?
A When I first entered, one.
Q Well, after you first entered and after you last left, how many people did you see in the house?
A Eight. Eight.
Q Eight people all totaled?
A Eight, including — Eight, excluding the officers.
Q Eight, excluding the officers.

Now when you got inside the house — Is that where you went, to the downstairs bedroom, you said, and you saw — and you saw some — saw someone throw a package in front of you?

A I testified I saw Mr. Calhoun.
Q Now didn't you say — didn't you tell us on direct examination that Mr. Calhoun came to the door, say you saw you were the police, and then closed the door?
A That is correct.
Q Isn't that right?
A Yes, sir.
Q And then — And then you went ahead and opened the door, isn't that correct?

You opened the door right away, didn't you?

A No, I did not.
Q (16) Well someone with you opened the door right away.
A Yes, sir.

Q Is that true?
A Yes, sir.
Q All right. And when you got in the house he was sitting down in the bedroom, and just as you walked in the bedroom he threw this packet of heroin right out in front of you, is that what happened?
A No, sir.
Q Well what did he do, did he secrete it?
A I testified I pursued him in the bedroom, he wasn't sitting down.
Q You pursued him to the bedroom?
A That is correct.
Q And then when he got in the bedroom he threw the packet down in front of you?
A Yes, sir.
Q Is that right?
A Yes, sir.
Q All right. Okay, Mr. Lehman. All right. Now after he threw that packet down in front of you and you and he were in the bedroom who else was in the bedroom besides you and Mr. Calhoun?
A No one.
Q No one. Now on the basis of that you went out and you search (17) everybody in the premises, is that right?
A No, sir.
Q Huh?
A No, sir.
Q Well you searched George. George was outside.
A I didn't search George.
Q Well somebody searched George.
A Yes, sir.
Q All right. And he wasn't even in the house when you first saw him?
A That is correct.
Q Well, —

THE COURT: Well where was he when he was searched?

THE WITNESS: In the living room, your Honor.

THE COURT: Well how did he get inside of the house?

THE WITNESS: He accompanied us inside.

THE COURT: What do you mean he accompanied you inside?

THE WITNESS: He said it was his house, your Honor.

THE COURT: Oh. Did you tell him to come in?

(18) THE WITNESS: I told him to come in.

Q (By Mr. Mitchell) You told him to come in, huh?
A Yes, sir.
Q You mean you brought him back, isn't that right? You ordered him in the house?
A No, sir.
Q Isn't that right? And you ordered him in the house, and then he was in the living room, he wasn't in the bedroom, was he?
A No, sir.

THE COURT: Did you give him the search warrant while you asked him to accompany you inside?

THE WITNESS: I believe I gave him the search warrant. I showed him the search warrant outside and gave it to him in the living room.

MR. MITCHELL: He said he did that after he got into the house. He already told me that on cross.

THE COURT: All right. I just wanted to be sure. Go ahead.

MR. MITCHELL: Yes. He said he showed him the warrant after he got inside. Showed it to him and gave it to him after he got inside, after he had broken the door down.

Q (By Mr. Mitchell) Now listen here, Mr. Lehman, now when you searched this young — Mr. Summers, did you search everybody else in the house, the other six people?
A (19) I didn't search Mr. Summers.
Q Well shoever did. I mean, you know, one of your brother officers.
A Officer Conant.
Q Were all of the people searched?
A Yes, they were.
Q All right. That's what I want to know, sir.

And they weren't all in the bedroom, downstairs bedroom, were they?

A No, sir.
Q All right. All right. Now did you ever — You work narcotics, I don't have to explain this to you, you know, you understand exactly what I mean.

Do you remember royally whipping Summers, Calhoun and Fudge and Johnny Leland and all of them; do you remember that?

A Royally whipping them?
Q Yes. Beating them. You know, striking them, hitting them?
A No, sir.
Q Huh?
A No, sir.
Q All right. Well did you notice that — Did you arrest Mr. Summers?

A No, sir.
Q Did you arrest Mr. Calhoun?
A (20) Yes, sir.
Q Did you see Mr. Summers when he was arrested?
A Yes, sir.
Q Well how do you account for all the bruises — the bruises on Mr. Summers and his jaw being swollen; do you remember that at all?
A No, sir, I do not.
Q You don't remember anything like that. Okay. All right. Now —

That's all. That's all.

MR. MC CLOSKEY: One further question, your Honor. I seem to recall —

THE COURT: We aren't going to finish this up, so I have got to be some place at a quarter of —

MR. MC CLOSKEY: Well one question, and I will put the stip in, your Honor.

THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MR. MC CLOSKEY:

Q It seems to me, if I recollect your testimony correctly, officer, it wasn't the same as Mr. Mitchell presented it.

Did you — When did you say you showed the defendant the copy of the search warrant?

(21) MR. MITCHELL: That's been asked and answered twice. I asked it —

THE WITNESS: Outside —

MR. MITCHELL: — and he asked it.

Q (By Mr. McCloskey) All right.
A — when I identified myself as a police officer.

MR. MC CLOSKEY: I thought that was what you answered.

It has been my recollection of your recounting the testimony, Mr. Mitchell, that you recounted it incorrectly.

THE COURT: You said one question now.

MR. MC CLOSKEY: That's it.

THE COURT: We will be back here at 1:30, —

MR. MC CLOSKEY: Thank you, your Honor.

THE COURT: — and finish up this Exam.

MR. MITCHELL: Because I have got to be in Garden City at 2.

THE COURT: Let's say by 1 o'clock. Be back here at 1 o'clock.

MR. MITCHELL: I will be here.

THE COURT: All right.

MR. MC CLOSKEY: Mr. Mitchell, do you need this officer any more?

(22) MR. MITCHELL: No, no. Let brother Lehman go.

Mr. Lehman is a tough man. Oh, yeah, about the money; about the money. There is a matter of $1500.

Can you give us the money back, Lehman?

THE WITNESS: Let's wait and see what happens with the Exam.

MR. MC CLOSKEY: It's evidence.

MR. MITCHELL: Evidence? Okay. Okay, Rog.

All right, 1 o'clock now, Judge.

THE COURT: Yes.

(At 11:35 o'clock a.m. the Examination of the above-entitled cause was recessed until 1 o'clock p.m. of the same day, Tuesday, October 22, 1974.)

---

(23) Detroit, Michigan
Tuesday, October 22, 1974
11:17 o'clock p.m.

- - -

(Whereupon, the Examination in the above-entitled cause was resumed pursuant to the noon recess; all parties present as previously indicated.)

- - -

THE COURT: All right, we will resume this Examination.

MR. MITCHELL: All right, sir.

ANTHONY CONANT,
was called as a witness by the People, and having been first duly sworn by the Court Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MC CLOSKEY:

Q State your name for the record, please.
A Anthony Conant.
Q And what is your occupation, sir?
A Police Officer, City of Detroit.
Q Were you so employed on October 10th of this year?
A (24) I was.
Q And were you on duty at 10:15 in the evening —
A In the evening.
Q — of that particular day?
A I was.
Q At that time and date did you have occasion to go to the vicinity of 9356 Mansfield?
A I did.
Q Is that in the City of Detroit?
A It is.
Q All right. Officer, would you relate to the Court what brought you to that particular address?

A I was there along with the rest of the crew to execute a search warrant.
Q Okay. And upon arriving at that particular address, where did you go?
A To the side of the house. Let's see. It would be the north side of the house.
Q All right. Did there come a time when you returned to the front entrance of that house?
A Yes, I did.
Q Okay. And what did you observe when you arrived at the front entrance?
A Well I heard people talking on the front porch, as I started around, because I thought they were — I thought (25) I heard the door open and I thought they were going in. Then when I just about got to the front I heard the door slam, and then Patrolman Lehman ordered the uniformed officers to force entry.
Q Okay. Did you go into the house, officer?
A I did.
Q Upon entering — Was there anyone besides the uniformed officers on the porch when you arrived on the front porch?
A The defendant George Summers.
Q What is he wearing in court today?
A He has a beige sweater and a white shirt; sitting next to counsel.

MR. MC CLOSKEY: The record should reflect that he's pointed to and identified the defendant George Summers.

Q (By Mr. McCloskey) Mr. Summers, in addition to the officers, were on the front porch, is that correct?
A That's true.
Q And when the door went down, where did Mr. Summers go?
A I — In the living room with myself.
Q All right. Who had the search warrant, officer?
A Patrolman Lehman.

MR. MITCHELL: That assumes —

THE COURT: Say what?

MR. MITCHELL: That assumes a fact not (26) in evidence. I don't think he's testified yet as to any search warrant.

MR. MC CLOSKEY: Well I think —

MR. MITCHELL: Mr. Conant has not.

THE COURT: Well some mention has been made of it.

MR. MITCHELL: By a prior witness, but not by this witness.

THE COURT: Yes. All right.

MR. MC CLOSKEY: I was asking him who had the search warrant. I think that one existed.

THE COURT: Yes.

MR. MC CLOSKEY: Is already in evidence.

Q (By Mr. McCloskey) All right, officer, did you take any action with respect to the defendant Summers after you had both went into the living room?
A Right then, you mean, immediately upon entering the living room?
Q That's correct.
A No, not right there I didn't.
Q All right. Did there come a time when you did take some action?
A Yes.
Q And when was that, officer?
A Well it was after the house was secured, I believe

everybody (27) was in the living room, I was — I went to the basement; underneath the bar there was two plastic bags concealed under the bar, of suspected narcotics.

Q All right.

A And I brought them upstairs.

Q All right. Had you made a determination of the owner, or who the owner of the house was at this time, officer?

A Before I went to the basement, you mean?

Q Before or immediately after returning from the basement?

A After I came back from the basement I found out that the owner was Mr. George Summers.

Q And how did you make that determination, officer?

A I believe I asked him, and then Mr. Summers himself stated that he lived there, this was his house.

Q Mr. Summers made that statement?

A Yes.

Q All right. After he made that statement, and after you found this heroin in the basement, what action did you taken in respect to Mr. Summers?

A I placed him under arrest for VCSA, and read him his rights, and a custodial search, and he had suspected heroin in his jacket pocket. So I told him he was also being charged with possession.

Q All right. What did you do with the suspected heroin that you found in his pocket, officer?

A (28) It was placed in evidence in a lock-seal folder.

Q Would you give the Court the lock-seal folder number?

A It was lock-seal folder 72 — 14-72628.

Q And did you convey that someplace, officer?

A That was conveyed downtown to the Scientific Lab.

Q And do you know what happened to the contents of lock-seal folder 14-72629; was that conveyed anywhere?

A To the Scientific Lab, to the best of my knowledge.

Q All right.

MR. MC CLOSKEY: Nothing further.

CROSS EXAMINATION

BY MR. MITCHELL:

Q Officer Conant, when you first went to this address on Mansfield were you with anyone?
A Yeah, I was in the company of a crew.
Q Of a crew. How many people were in that crew? Not the names, just — You happen to have the names too, don't you?
A Yes, I believe.
Q The members of the crew. How many were in that crew?
A How many were in the crew?

Myself, Officer Lehman, Sgt. Mazigian, Patrolman Ashford, McKinney, in plainclothes, and in uniform there was officer — I believe it was Deitch, and there was (29) another officer there, I don't know — I can't remember his name. Fitzgerald.

Q All right. And you said when you arrived at the Mansfield address — Were all of you — You went to the side door, is that right?
A It's not a door, just the side of the house.
Q The side of the house.

Now did you and Lehman come in the same car?

A I believe we did. I don't recall.
Q All right. Now when you and Lehman first went to the house, did you see — did you see Mr. Summers here?
A Did I see him?
Q Uh-huh.
A Well when I was taking my position on the side of the house the door was then open and he was coming out. He was — I think he was on the steps, he was walking out of the house. But I didn't go to the front door, so I —

Q Out of the side door?
A The front door. He came out of the front door.
Q Okay. Now you said you were around by the side, but there was no door on the side?
A No.
Q Yet you — Are you telling us that standing around on the north side of this house you did see someone in fact leave?
A (30) I said —
Q You're not telling us that, are you?
A No, I'm not.
Q You're telling us that you heard a door slam, is that right?
A Well, no that's not what I said either.
Q What did you say?
A I said that while I was taking my position on the side of the house, while I was running up to the house Mr. Summers was on his way out of the house.
Q You got him out of the house now?
A He was on — He was walking like down. I think there was 2 or 3 steps there.
Q Now when you saw him come out of his house, didn't he in fact get in his car and drive away?
A No, he did not.
Q You don't remember that?
A No, I do not.
Q Now do you remember the corner of Greenfield and West Chicago?
A Do I remember it?
Q Do you remember it, or are you familiar with it?
A I'm familiar with it.
Q All right. Now there is a filling station on that corner, on one of the four sides of that corner; did you know that?
A I believe there is.
Q Now did you see Mr. Summers when he went down to that station; (31) did you follow him?
A No, I did not.
Q You did not follow him.

Did you wait for him until he got his car all attended, spark plugs and washed and points and everything like that?

You don't remember waiting for him out there on the apron of the driveway?

A No, I do not.
Q All right. Do you remember calling — Do you remember calling Mr. Summers over to your car and telling him to get in your car and ride back with you?
A No, I do not.
Q You don't remember that, do you?
A No, I don't.
Q All right. Well when you came around to the front of the house you did see — you did see Mr. Summers, is that right?
A I did.
Q And Mr. Summers was outside of the house, is that right?
A He was.
Q Now Mr. Summers was outside of the house, and you took him back in the house, is that right?
A I did.
Q Now he wasn't a member of your crew, was he?
A No, he was not.
Q (32) And you didn't think he was going to aid you at all in making this raid, did you?
A I did not know what he was going to do.
Q What was your search warrant for, to search the premises at 9673 Mansfield?
A I did not have a search warrant.
Q You didn't. All right. Thank you.

Now you didn't have a search warrant. Now is there any way you want to change that at all?

A I said I wasn't in possession, there was a search warrant for the house.
Q What makes you think there was a search warrant for this house?

What makes you think that?

A What makes me think there was a search warrant for the house?
Q Yes, sir. What makes you think —
A I seen the search warrant.
Q You saw the search warrant?
A Yes, I did.
Q And the search warrant said to search what?
A I didn't read the search warrant.
Q Well you have had search warrants before?
A Yes, I have.
Q And this search warrant was to search a particular address, (33) wasn't it?
A Right.
Q Do you remember the address?
A 9356 Mansfield.
Q And you are already at that address, weren't you?
A What do you mean I was already at that address?
Q Weren't you at that address? You were around the side of the house. Was that the address you intended to search?
A That's correct, yes.
Q Now it didn't say anything in that search warrant about searching people outside of the house, did it?
A No, it didn't
Q All right. Now you took Mr. Summers back in with you, is that right?
A I did.
Q Now were you around there when they first knocked on the door?
A I wasn't there. I wasn't in front when they knocked on the door.
Q Well, I was going to strike that question anyway.

I meant to ask you was there a knock on the door that you heard?

Did you hear a knock on the door?

A No, I don't. I can't recall hearing anybody knock on the door.
Q (34) All right. And the only thing you can recall is somebody knocking the door down, is that right?
A Well I heard talking on the front porch, then I walked to the front, and then I seen them knock it down.
Q Now when you — Now knock down, now I am talking about a door; did you see anybody knock down George Summers off the porch onto the ground; did you see anybody do that?
A No, I didn't
Q You didn't see anybody. Did you ever lift him up and bring him back up on the porch as he was knocked down?
A No, I did not. After we gained entry Patrolman Lehman told me to bring him on inside.
Q All right. You took him on inside?
A I did.
Q Now when you went inside, what did you do immediately after you got inside?
A Well I was in the living room with Mr. Summers.
Q All right. You kept Brother Summers right close to you, is that right?
A He was there.
Q All right. What did you do after you kept him in your close view like that; did you every go anyplace else in the house?
A Not until after the house was secured, then I went to the basement.
Q And did Mr. Summers go with you down into the basement?
A (35) No, sir. He stayed in the living room.
Q All right. And that's the bsement where you claim you found some traces of some white powder, is that right?
A I found two bags of suspected narcotics.
Q All right. Now after you secured the house, about how many people would you say were in this house besides — besides Summers, and I presume Calhoun was there, so besides these two people how many civilians?

A I think there was six other people.
Q Six other people in this house?
A Five or six.
Q And how many of these people lived in this house? Did you ever ascertain that?
A No, I did not.
Q All right. Now when you came back you arrested — you arrested Summers for VCSA, is that right?
A True.
Q And what was — How had he committed a VCSA at the time you arrested him?
A He owned up that he — He said that he was the owner of the house, and after finding the narcotics sitting in the basement.
Q I see. Did he ever — Did anybody else ever own up to living there besides him, or don't you know?
A I don't know.
Q All right. So there are other people there now when you — (36) Now you claim after that then you put him under arrest and then you searched him, is that right?
A I gave him his rights and searched him.
Q Gave him is rights and searched him. And you told us what you — some of the things you found when you searched him.

Now tell me this, while you were searching him, or after you had searched him first — his person, did you ever find any money on his person?

A I believe there was some money on him.
Q Do you remember how much that was?
A No, I don't.
Q Did you ever make a record of it?
A Did I?
Q Yes, sir.
A No, I didn't.
Q Well I mean when I say — I don't mean you, you know, just you singularly, I mean did you or someone else in your presence make a record of it?

A There was a record made of it.
Q Well I wonder — All right. All right, hold that — hold that for a moment now.

Now tell me this, did you ever search any other parts of the house, other than Summers' person?

A The basement.
Q (37) Did you ever find any money in any other parts of the house?
A Did I ever? No, I did not.
Q I don't mean you.
A Well I do not know what anybody else found. I did not find it.
Q All right. Tell me this, who made the — you never saw the search warrant?
A I seen —
Q Is that right?
A I told you I seen the search warrant.
Q What I mean to say is you never saw it in terms that you remember what you saw on it?
A Right.
Q You don't remember, is that right?
A Right.
Q And you didn't see anybody served a search warrant, is that right?
A Not that I can recall.
Q All right. Now tell me, number two, do you have anywhere in your possession an inventory of what you found?
A A return?
Q Yes, sir.
A I do not have it, no.
Q You don't?
A I did not make a return.
Q (38) Would you have it anywhere in your files?
A I believe there is a return in the files.
Q All right. Now would the return indicate that you had found a certain amount of money in the return?
A Everything that was confiscated would be on the return.

Q All right. Now you searched him. Do you remember how much money, approximately how much money?
A I have no idea.
Q You don't know whether it was 3000 or 4000 or —
A No, I don't.
Q — 100, or anything like that, right?
A (Shaking head.)

MR. MITCHELL: All right. That's all, sir. That's all for me.

MR. MC CLOSKEY: One question, your Honor.

REDIRECT EXAMINATION

BY MR. MC CLOSKEY:

Q Officer, you said that you heard some talking on the porch after taking your position on the side of the building?
A Right.
Q You returned to the front of the building, you got there in time to see the other officers knocking down that door, is (39) that correct?
A Right.
Q Before you got around to where you could observe them knocking down the door, did you hear anything else besides the talking?
A Just conversation between Mr. Summers and somebody inside.
Q Okay. It seems to me — Did you ever hear a door slam while you were —
A I said I heard a door slam. There was a door slam.
Q You did say that?
A Right.
Q MR. MC CLOSKEY: Okay. Thank you. Nothing further.

Your Honor, at this time —

Do you have any further questions?

MR. MITCHELL: No, I have no further questions.

MR. MC CLOSKEY: Then at this time, your Honor, it is my understanding that defense counsel and the defendants, both of them in this case, have agreed to the following stipulation:

That is to waive the production of the evidence, stipulate to the chain of evidence in this case, and to waive the testimony of the chemists, in this case which would be a Lorin Budzinski on File No. 74 07989, that (40) is as to defendant Calhoun, and a Dennis Lippert on File No. 74 07993, that is as to defendant Summers.

Furthermore, defense counsel, for purposes of Examination only, of course, will stipulate that the — to the contents of the report that these chemists have submitted. That is, should the chemists have appeared today and testified, Lorin Budzinski would testify that lock-seal folder No. 14-72629 was examined and found to contain two clear plastic packets of tan powder, the powder having weighed 12.7 grams, and containing heroin.

Should Dennis Lippert have appeared today and testified, he would have testified that he examined the contents of lock-seal envelope No. 14-72628, and found that it contained one envelope containing a brown powder, amounting to 8.5 grams, and that powder contained heroin.

Is that correct, counsel?

MR. MITCHELL: Yes, I — that is correct. I mean that is correct as far as any stipulation is concerned.

MR. MC CLOSKEY: Yes. For the purposes of examination.

MR. MITCHELL: Uh-huh.

THE COURT: All right.

(41) MR. MC CLOSKEY: At that — At this point, your Honor, — Well, I can see there is a problem on one of these files, and I would like to make a short oral argument before I make my motion, if the Court will permit.

THE COURT: All right. Now what about the introduction of the evidence? Are you objecting to that?

MR. MITCHELL: As to Mr. Summers there is. I just stipulated to whatever they — the chemist would say would be —

THE COURT: All right.

MR. MITCHELL: But I have not — No, sir, I have not agreed.

THE COURT: All right, you have not offered the exhibits then?

MR. MITCHELL: No, sir, he has not.

THE COURT: All right. He says he wants to make an argument. Go ahead.

MR. MC CLOSKEY: Right. Perhaps — I move to admit the evidence at this point, your Honor, and allow Mr. Mitchell to make his argument, then I will respond.

MR. MITCHELL: Well, we can make it

altogether. I am going to object, and whatever you want to (42) say —

THE COURT: For what reasons do you object, that's what I want.

MR. MITCHELL: Oh, all right. All right.

Now let's get to the first one that he — the first one first, George Summers.

Your Honor, there is no reason at all that Summers should have been brought back into the house and then searched. There are just — I don't know where to begin, there is just so much law in his behalf that I thought I was going to let the Prosecutor — I thought he was going to make a motion to dismiss as to Mr. Summers. I didn't want to get into a long argument.

Is that what you were planning to do, is make a motion to dismiss as to Mr. Summers?

MR. MC CLOSKEY: No, I was planning on listening to your argument on my motion to admit the evidence, Mr. Mitchell.

MR. MITCHELL: Oh. All right.

Well I have never heard before, and I wanted — I had intended to — if this had been a younger Court I was going to — I was going to introduce testimony from the defense, but somehow with this Court I feel as though I can talk through the defense rather than going through — rather than having both of these gentlemen take (43) the stand.

I have never seen a case where the evidence here shows that the man is plainly outside of his house.

One officer says that he never saw the serving of a search warrant, yet he was around there to see them all go in together. And he didn't — And we are talking about a question here, we are talking about fractions of a minute. he says he came back, he never saw the serving — the serving of a search warrant.

The other officer is not sure as to — to me he said the man got it after he got in the house, but on recorss (sic) to the Prosecutor he said he gave it to him — he told him about it, at any rate, on the outside.

Now there was no reason to bring the man back into the house, the premises — the search warrant if they had one was to search the premises.

Now to bring the man back into the house just about violates everything I can think about. It is certainly a harsh entrapment case. Certainly when you bring him back inside. No reason. They had no reason to search him outside, it was all inside.

Now we get inside. Now you remember Mr. Lehman's testimony that he came and he said that he pursued Calhoun, who claims he had stopped — who had slammed (44) the door in his face. He used his battering ram, came in and followed Calhoun into a downstairs bedroom.

Now the only reason that he told you that he slammed the door and had to use the battering ram was to tell you inferentially that Calhoun knew they were the police.

Now, Calhoun knows the police are here, the police are right behind him in hot pursuit, right step after step, he runs into the bedroom, and what does he do, he reaches into his pocket and throws a bag of heroin right at the officer's face. That just violates any — any kind of credibility; any kind of credibility.

Now, what happens after that? They get in the house — we have a crew here of approximately 7 or 8 men, and who do they find? They find a house full of people, eight different people.

Now they go from there and they search the house, and what do they do? They go down in the baement somewhere, and they come up with a packet of what they called — well we won't argue that. A packet of heroin. Whose is it? I don't know whose it is, there are eight people in this house at this point, eight civilians.

Then he comes back and arrests Mr. Summers for VCSA. To-wit, what part of VCSA? It wasn't his exclusive control. This man was outside, not down in the (45) basement, and further, he was in the house, was in the living room, and standing there like that.

Now what do the police do? The police come back up now and search him, and claim they found some narcotics on his person.

I say no, no probable cause to search this man at that point. None whatsoever. And certainly the man should not have even been in the house. That's my point your Honor. I don't — I don't — I would ask that the matter be dismissed both as to — there is no doubt as to Mr. Summers, but both as to Summers and to Calhoun, on the basis of what we have heard here so far.

MR. MC CLOSKEY: With respect to the defendant Calhoun, first, your Honor. I think that defense counsel's re-enactment of what occurred in his words, of course, does sound incredible. But I think if we look at what the officer testified, Officer Lehman testified as to what occurred. This defendant was seen at the front door, he slammed the front door in the officer's fact, and then at that point they use a

battering ram to gain entry into the house.

Now upon gaining entry into the house Officer Lehman took off in the direction that Mr. Calhoun had taken off into. And, as I understand, they went down into the basement, a basement bedroom. This was a hot pursuit, (46) if you will, type situation.

And I think that Mr. Calhoun's actions were reasonable. The point — the thing that I believe he was trying to do was to get off his person narcotics, relizing (sic) that the place was being subjected to a search under a search warrant, the worse thing that could have happened to Mr. Calhoun would have been to have been searched and had narcotics found directly on his person.

So what he did, as soon as he got into this bedroom, thought he was out of view, is discard a bag of narcotics that he had. What he didn't realize is that Officer Lehman was close behind him and actually saw him toss those narcotics at a — on a bed.

And I don't think there is anything inherently incredible about that. This has all happened in a very quick amount of time, and Mr. Calhoun simply misjudged how much time he had to get rid of what he had on him.

Going now to the defendant Summers, your Honor; that presents somewhat of course a different problem.

We have moved also to admit the evidence in this case.

In this case, your Honor, I think we have to take the testimony of both officers together. We (47) are dealing with the question really of probable cause.

Now first of all both officers testified that they saw Mr. Summers leave that house located at 9356 Mansfield as they approached the house with the search warrant to execute the search warrant.

Officer Lehman testified that outside the house he showed this defendant Summers a copy of the search warrant. And at that point in time, your Honor, Officer Lehman testified that defendant Summers indicated to him that this was his house, that he didn't presently have his keys, but that they could buzz and have the cousin admit them to the house. So they went up on the porch and the officer testified that's exactly what defendant Summers did, he used some sort of an intercom system, pressed the button, someone answer on the other end, there was conversation, and eventually this man's cousin, if you want, I don't know whether they are related or not, but a person, Mr. Calhoun showed up at the door and opened the inside door, leaving the screen door locked.

Now defendant Summers was in fact on the porch at the door when Mr. Calhoun slammed the door and the officers used their battering ram to get in.

Now, since Mr. Summers had already at that point admitted to the officers that this was his house, that it was his house that was the subject of the (48) execution of the search warrant, and he accompanied them inside the house.

Now whether or not these officers specifically ordered him in or not, I am not sure whether it is relevant at this point, because at this point Mr. Summers already made an admission that this is his house that is the subject of a search warrant. And since it is his house, he is the person that should receive the search warrant, should receive the return and should be present when the house is searched.

Now we have laws covering the execution -- the proper execution of a search warrant also in this State, and I think it was reasonable to have Mr. Summers there while the search warrant was executed.

Now the officers then -- Officer Conant searched the rest of the premises and found in the basement two bags of suspected narcotics.

Now it's Mr. Summers at this point who has admitted that this is his home, and when a person owns a home, lives in that place, it's expected he has control over various things in that house.

THE COURT: Let me ask you a question.

MR. MC CLOSKEY: Yes, your Honor.

THE COURT: Do you have the authority to go down in the basement?

(49) MR. MC CLOSKEY: Under the search warrant, your Honor, they had the authority to search the entire premises.

THE COURT: That's in the serach warrant?

MR. MC CLOSKEY: Do you have a copy of the search warrant?

I would assume that they exceeded their range, your Honor, but that might be proper subject of a different type of hearing in this court. But I would -- I don't think that question has been raised.

Yes, your Honor, it is generally search the premises known as 9356 Mansfield, which is a 2-story single dwelling. And then it goes on to describe the rest of the -- more specifically the type of dwelling it

is, and exactly where it is located.

But it's to search the entire premises.

THE COURT: It says that, entire premises?

MR. MC CLOSKEY: No, it says premises, your Honor, but I think that would assume the entire premises, it doesn't limit it to the first floor or the second floor or any specific room in the place. I think that's a reasonable reading on the fact of the search warrant, that it means the entire premises, since it is not (50) limited.

All right, now once Officer Conant found this heroin in the house, returned upstairs and again received confirmation from Mr. Summers that he in fact owned the house, I submit to the Court that he at that point had probable cause to arrest Mr. Summers for control of heroin, a violation of the state controlled substance act.

Now once — And I believe that is probable cause, your Honor, and once he had that probable cause, then of course the search of the person naturally follows. And that in fact the heroin was found on Mr. Summers' person is what he has been charged with in this case. The heroin found during that custodial search after he had been arrested for control of heroin.

THE COURT: What about what they found in the basement, is that —

MR. MC CLOSKEY: That, your Honor, is what the officer was acting on. I think his actions were reasonable.

THE COURT: No, no. I am asking you, is that evidence — was he charged with possession of that?

MR. MC CLOSKEY: No, he was not, your Honor.

THE COURT: Oh. All right. Okay, go (51) ahead.

MR. MC CLOSKEY: I think we don't — However, I think the law is clear that we don't look at — we don't use hindsight in determining whether an officer was reasonable in his actions. A Prosecutor sitting up on the 11th floor trying to decide whether or not Mr. Summers will be charged with what is found in the basement has a lot more law at his disposal and has a lot more hindsight, but I think this officer at that time can reasonably assume that Mr. Summers admitted ownership of the place had control of the heroin he found in the basement. And I think, therefore, the arrest, even though it did result in a warrant subsequently, was a valid arrest and search following, your Honor.

And, therefore, I renew my motion to admit the evidence in this case on both defendants and on both files.

MR. MITCHELL: Your Honor, I don't think it should be admitted. I think Mr. Summers was arrested on the outside of the house. I don't think he came back in freely and voluntarily. I think he was arrested and I think the record will show that he was arrested and brought back into the house forcefully. If they had a search warrant they could just serve the search warrant. There is nothing in the search warrant that says (52) they had to search the person of Mr. Summers out on Mansfield. The search warrant was to search the premises. Now they went —

THE COURT: What about the fact he was coming out as they were going to execute the search warrant?

MR. MITCHELL: Well he still was not in the -- the search warrant is to search the premises, not to search this man. They had no — they had no — even after the man got in the house they had no cause to search the man.

THE COURT: You mean if he walked back in willingly?

MR. MITCHELL: He didn't walk back in.

THE COURT: I am asking you that question, if he did.

MR. MITCHELL: If he had walked back in willingly, of course, the case would have a little bit different angle. But the first officer testified that they took him back in, if you remember that.

THE COURT: No, I think he said he walked back in with him.

MR. MITCHELL: Yes. Well I understood him to say he took him back in, because obviously he had taken him back in the house, because they had to use (53) a battering ram to get inside.

Now if it was a man's house, I've never seen a man use a battering ram to get inside his own house. If it was his own house he would have a key, he knew how to open the door, he could walk in, or if there is somebody in there who would know him would admit him. They treated him like he was a stranger. He hollered in the house, and said, "George." And they said, "George who?" A man came to the door and looked at him and slammed the door in his face and walked away. Now that doesn't seem to me like he is the man of the house. It seems to me like he is a trespasser there.

Now we don't have anything — And they haven't introduced anything here in testimony that shows this man owns this house, or it isn't his house. They haven't shown us one water bill, one electric bill, one gas bill, one rent receipt, nothing; no cleaning receipt, nothing to say. They just sit down and say this is his house, this is George's house.

Now I don't think that is sufficient.

THE COURT: All right. Anything further?

MR. MITCHELL: That's all, your Honor. On the admission of the evidence.

MR. MC CLOSKEY: I think we have exhausted argument and cross-argument and rebuttal.

(54) I still move to admit the evidence, and once the Court rules on that I will make my motion to bind the defendant over.

THE COURT: All right. The evidence will be admitted.

MR. MC CLOSKEY: At this time, your Honor —

MR. MITCHELL: I wonder if we can — that's evidence. We would like to submit some testimony, your Honor, if you don't mind.

THE COURT: I have no objections.

MR. MITCHELL: All right.

THE COURT: Go right ahead.

MR. MITCHELL: All right. Before you make your motion.

Take the stand.

That's all, we don't have anything more.

THE COURT: I thought you wanted to put in some testimony?

MR. MITCHELL: No, we are going to change our mind. We will save it for another time.

THE COURT: All right. Mr. Prosecutor?

MR. MC CLOSKEY: Yes. The evidence having been admitted on both files, your Honor, at this time (55) the People would move to bind over the defendant George Summers on File No. 74 07993 on the charge contained in the complaint and warrant.

And also would move to bind over defendant Dwight Jerome Calhoun on File 74 07989, on the charge contained in the complaint and warrant.

MR. MITCHELL: Well, your Honor, again I would renew my motion to dismiss, certainly as to Mr. Summers; certainly as to Mr. Summers, the outside man.

And, of course, I make it on behalf of both men, but certainly as to Mr. Summers.

THE COURT: All right. The Court finds that the crimes charged in the complaints and warrants in these two cases were — the crimes were committed within the corporate limits of the City of Detroit, and that there is probable cause to believe these defendants committed that crime.

Therefore, they will be bound over on the charges contained in the complaints and warrants in these cases.

All right, now what are their bonds?

THE CLERK: A thousand personal each, your Honor.

THE COURT: How much?

THE CLERK: $1,000 personal bond on each.

(56) THE COURT: On each man?

THE CLERK: Yes, sir.

THE COURT: All right. Ask them to stand up, I want to question them.

Mr. Calhoun, where do you work?

DEFT. CALHOUN: I don't.

THE COURT: Say what?

DEFT. CALHOUN: I don't.

THE COURT: No. How old are you?

DEFT. CALHOUN: Twenty-one.

THE COURT: Why don't you work?

DEFT. CALHOUN: I'm a bowler.

THE COURT: You're what?

DEFT. CALHOUN: A bowler.

MR. MITCHELL: A professional bowler, your Honor.

THE COURT: Oh, you're a professional bowler?

MR. MITCHELL: Yes. Average 202.

THE COURT: Do you win anything with that?

DEFT. CALHOUN: Yes.

THE COURT: 202?

DEFT. CALHOUN: Yes.

THE COURT: You mean if you hustle, that isn't going to win no professional bowling.

(57) MR. MITCHELL: Oh, yes, Judge; that is tournament bowling; 202.

THE COURT: You might get in the tournament, but you aren't going to win no $20,000 with 202. No. I see those things on television, you know. No, no.

MR. MITCHELL: A lot of times we are higher than 202.

THE COURT: Say what?

MR. MITCHELL: A lot of times we are a lot higher than 202, your Honor. We get very high.

THE COURT: Wait. I didn't hear what you are saying.

MR. MITCHELL: I say a lot of times we are a lot higher than 202.

THE COURT: You're a lot higher?

MR. MITCHELL: Yes, sir.

THE COURT: Yes, that's what I'm saying.

MR. MITCHELL: That's right.

THE COURT: You have to be higher than that to win.

MR. MITCHELL: Oh, yes, we —

THE COURT: Unless you are hustling.

MR. MITCHELL: We have got a year-round average of that 202.

(58) THE COURT: Well that's good.

MR. MITCHELL: In and out. That's pretty good.

THE COURT: Nothing wrong with that.

MR. MITCHELL: Yes sir.

THE COURT: Have you ever been arrested and convicted for any crime anywhere?

DEFT. CALHOUN: No.

THE COURT: All right. Now what about Mr. Summers?

MR. MITCHELL: He's pretty clean too, your Honor.

THE COURT: Where do you work?

DEFT. SUMMERS: Martin's Cleaners.

THE COURT: Martin's Cleaners?

DEFT. SUMMERS: Right.

THE COURT: How long have you worked there?

DEFT. SUMMERS: About 6 or 7 years.

THE COURT: Have you ever been arrested and convicted for any crime anywhere?

DEFT. SUMMERS: Right.

THE COURT: For what?

(59) DEFT. SUMMERS: Grand larceny.

THE COURT: How many times?

DEFT. SUMMERS: Well I was in Jackson — I was convicted twice, but it was together. I have been up there once.

THE COURT: And how long ago was that?

DEFT. SUMMERS: In '67.

THE COURT: '67?

DEFT. SUMMERS: (Nodding head.)

MR. MITCHELL: Not since he has been working has he been in any trouble.

THE COURT: You came out, and you haven't been in any trouble since?

DEFT. SUMMERS: No.

THE COURT: Do you use narcotics?

DEFT. SUMMERS: No, I don't.

THE COURT: Never did?

DEFT. SUMMERS: Never have.

THE COURT: Never been an addict?

DEFT. SUMMERS: No.

MR. MC CLOSKEY: Your Honor, I — if I may, with respect to defendant Summers, since he says he has never been arrested and convicted, I find it hard to explain how come he has a police identification.

MR. MITCHELL: No, he says he has been.

(60) MR. MC CLOSKEY: Oh, he has been.

THE COURT: Yes. No, Calhoun said he has not been.

MR. MITCHELL: Calhoun.

THE COURT: Summers just stood up and said he had been to Jackson.

MR. MITCHELL: Yes.

THE COURT: He knows what it is like up there, he wants to go back.

MR. MITCHELL: No, we don't want to go back, your Honor.

THE COURT: Yes. If he keeps fooling around he will be; in this courtroom he will, he will go back up there as far as that bus can get him up there.

All right. Now I am going to tell you, if either one of you are involved, and especially with any narcotics, I am going to know about it, that's the system we have here, and when it comes to my attention — I am not saying when you are convicted now, I am saying if you are involved; if you are around it, you are going to be over there in Sheriff Lucas' hotel before you go to Jackson; that will be a little rest stop for you, you know.

Now don't go out there and fool around, you have better go and protect that job you have got, and you had better increase your bowling average, or you will (61) be back here, see? See?

DEFT. CALHOUN: Yes, sir.

THE COURT: All right, I will continue both bonds, and you go back to Judge who? Which one of the Judges?

THE CLERK: Judge Borman.

THE COURT: You will get your pre-trial — I mean your blind-draw Judge.

All right.

-oOo-

MOTION TRANSCRIPT

STATE OF MICHIGAN

IN THE RECORDER'S COURT

FOR THE CITY OF DETROIT

PEOPLE OF THE STATE OF MICHIGAN,

vs. No. 74-07993

GEORGE SUMMERS,
Defendant.

_____/

MOTION

Proceedings had in the above entitled cause before the Honorable Robert J. Colombo, Judge of the Recorder's Court, on Tuesday, November 19, 1974.

APPEARANCES:

JOHN McCLOSKEY,
Assistant Prosecuting Attorney
Appearing on behalf of the People.

CAROL CHAMP,
Attorney at Law
Appearing on behalf of the Defendant.

REPORTER: A. L. Kirk

TYPIST: K. MacRae

(2) THE COURT: File No. 74-07993, People of the State of Michigan vs. George Summers. This is a Motion to quash the information on the grounds that the magistrate abused his discretion in binding the Defendant over for trial in that there was no probable cause for his arrest for the violation of the Controlled Substance Act under the conditions that were testified to at the Preliminary Examination and that the search of his person being an unconstitutional invasion of his rights under the search and seizure provision of the 4th Amendment of the United States Constitution as applied by the 14th Amendment to the states, he is entitled to have the evidence suppressed and the information quashed and the Defendant discharged. After reading the Examination of some sixty-two pages the Court, Mr. McCloskey, is of the opinion that No. 1, that the magistrate should not have admitted the evidence at the Preliminary Examination because the evidence at the Preliminary Examination on October 22, 1974, shows that the Defendant was walked back into the house during the execution of the search warrant, that he did not re-enter the premises voluntarily, that the other Defendant who was bound over for trial and quite properly, actually did throw the narcotics on the bed and that even though there were other narcotics found on (3) the premises there was still no probable cause at this time to search the Defendant Summers for any offense in connection with the execution of the search warrant even though he was listed as the owner of the premises based upon the affidavit for the search warrant at the time it was issued because he was outside of the premises.

The question I ask you, is could the police have arrested Summers outside of the house and searched him and seized him and arrested him for violation of the Controlled Substance Act?

MR. McCLOSKEY: The answer would have to be no, your Honor, they could not have arrested

him outside of the house as he approached the house.

THE COURT: Having then forced him back into the house, how does their position then become legal? That's the problem you are going to have to explain to me, to my satisfaction.

MR. McCLOSKEY: I am not sure if I can, your Honor. Our position in this particular case is that what happened outside the house was a valid investigatory stop by the officers armed with a search warrant. The facts they had available to them at the time they approached the house is they saw a man —

(4) THE COURT: I don't have any problem with that, Mr. McCloskey. In fact it was obvious to me that they got little of no cooperation from Mr. Summers or the person inside the house. It is obvious that they had right to use reasonable force to gain entry into the premises. We've still got Mr. Summers outside the house and they bring him inside the house and that's the problem that disturbs me here. Plus there is no overt act at all from the testimony at the Preliminary Examination done by Mr. Summers which would give probable cause for the officers to search him.

MR. McCLOSKEY: All right. Mr. Summers, your Honor, as the Court has pointed out, is named in the search warrant and I could offer, make an offer of proof that he is named in the search warrant.

THE COURT: I have no problem on that. But the law also happens to be that you can't use a search warrant as justification to make a case.

In other words, to gain the fruits of illegal activity. The search warrant itself is a creature of statute and is to be construed very strictly because it's in violation of the common law and the constitution and

as such must strictly be construed by (5) any court. Given that situation and the factual situation here as it appears to the Court that the search warrant is being used as a tool to search the Defendant to gain evidence from him to establish probable cause.

MR. McCLOSKEY: Your Honor, my recollection of the testimony at the exam was that the officers, in executing the search warrant, searched the entire house and found narcotics in the basement of that house.

THE COURT: No question that they did and no question in the judgment of this Court that they could do that. However, having done that they already have Mr. Calhoun in custody, they also have Mr. Calhoun in possession of narcotics, you can't arbitrarily charge Mr. Summers with control or possession of those narcotics under People vs. Davenport.

MR. McCLOSKEY: All right. Point — well first of all, I am not sure if People vs. Davenport applies to this situation.

THE COURT: Assuming that you are going to use the search of the basement and the finding of the narcotics as probable cause, People vs. Davenport does apply.

(6) MR. McCLOSKEY: Certainly People vs. Davenport applies to the point that this man could never be convicted of possession or control of narcotics found in the basement. It's not probable cause for a police officer to make an arrest. I don't believe that Davenport holds that finding narcotics in a home and having information from the Defendant that he in fact owns that home, does not give the officer probable cause to arrest for control of narcotics. In this particular case we are dealing with an officer and, of course, with hindsight we can look back and say we

could never convict Mr. Lehman — Mr. Summers, excuse me, of control of narcotics found in the basement, at least on the Davenport decision. But we are talking about an officer who executed a search warrant, found narcotics and had positive information that the house was owned by this particular individual.

So he had probable cause that a crime had been committed.

THE COURT: Had they arrested him for loitering in a place of illegal occupation, I might agree with you but they didn't arrest him for that. They just arrested him and then made a search and then found narcotics.

(7) MR. McCLOSKEY: No, your Honor, that is not correct.

THE COURT: What did they do then?

MR. McCLOSKEY: They found the narcotics in the basement and then came upstairs and Officer — the officer at that point confirmed with Mr. Summers that he, in fact, owned the house and at that point the officer testified at the Exam that he arrested Mr. Summers for violation of the Controlled —

THE COURT: Right. For what offense could he possibly have arrested Mr. Summers at that time, for violating the Controlled Substance Act?

MR. McCLOSKEY: Probable cause to believe a crime was committed, narcotics found in the basement.

THE COURT: People vs. Davenport. He has no basis, in fact, for that under Davenport.

MR. McCLOSKEY: There is no basis in

fact for a conviction, your Honor, there is no basis in fact for a warrant for Mr. Summers who would be charged with possession of controlled narcotics, the narcotics found in the basement.

THE COURT: What about the fruit of the poisoned tree? If he couldn't be prosecuted under (8) Davenport and convicted, how does then the fact that he is then arrested and they find additional narcotics on him, if originally it's tainted, doesn't it become tainted in its future application?

MR. McCLOSKEY: That's a correct interpretation of the fruit of the poisonous tree but I don't believe it applies in this case. First of all, we have found narcotics legally under a search warrant, we had a search warrant to search the entire premises. So there is probable cause to believe a crime had been committed. We had Mr. Summer's admission that he is the owner of the house. It is our contention that this gave the offier probable cause to believe that Mr. Summers committed the felony of possession or control of narcotics.

Certainly it does not give us a basis for prosecuting Mr. Summers for the narcotics that were found in the basement. But the officer's actions aren't viewed as if he was a legal scholar. I think all of the questions have dealt with the question of arrest. I cite People vs. Harper, 369 Michigan. They say it is not approached from the view of a legal scholar but on facts based, viewed by the police officer at the time of the arrest. So we have the —

(9) THE COURT: I agree with you, I agree that he didn't have it.

MR. McCLOSKEY: We have the narcotics found, admission of the ownership of the house and we had a search warrant in which Mr. Summers is listed as

the person from whom the buy was made. I say these facts taken in toto, your Honor, would give the officer who is not a legal scholar, probable cause to believe that Mr. Summers had —

THE COURT: He didn't have probable cause and that's the thing that is wrong with the whole situation. Plus the fact that they made the man go back into the house and to the extent that Judge Heading in making his decision found that he went in voluntarily, Judge Heading misconstrued the testimony not only of one police officer but of both police officers who testified. Because one police officer, a layman, said that he told him to come into the house. The other police officer who testified said that Lehman directed him to bring him into the house and he did bring him into the house.

For that reason, given the totality of the circumstances here, the Court feels that the motion (10) to suppress is well taken and the Court does suppress the evidence, does quash the information, the Defendant is discharged and his bond is cancelled.

MISS CHAMP: Thank you very much.

* * *

CERTIFICATE OF COURT REPORTERS

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

This is to certify that I, A. L. Kirk, stenographically reported the foregoing proceedings had in the above-entitled cause, and that the annexed and foregoing typewritten transcript constitutes a complete and accurate report of such proceedings and my stenographic notes so taken.

/s/A. L. Kirk
OFFICIAL COURT REPORTER

SEARCH WARRANT AND AFFIDAVIT

SEARCH WARRANT
(Case #747-14-23 — #14 PNU)

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY:

On this day Roger Lehman, affiant, having subscribed and sworn to an affidavit for a search warrant, and I having under oath examined affiant, am satisfied that probable cause exists;

THEREFORE, IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, I command that you search the following described place:

Premises known as 9356 Mansfield which is a 2 Story single-dwelling. Premises is located on the East side of Mansfield, North of Ellis, and South of W. Chicago. Premises is located in the City of Detroit, County of Wayne, and the State of Michigan.

and to seize, secure, tabulate and make return according to law the following property and things:

1. HEROIN.
2. ANY OTHER NARCOTIC MATERIALS AND PARAPHERNALIA.

The following facts having been sworn to by affiant in support of the issuance of this Warrant:

1. Affiant is a member of the Detroit Police Department working in conjunction with a confidential informant regarding the purchase of bulk Heroin from the premises at 9356 Mansfield.

2. Affiant knows the informant to be credible and reliable, and has used the informant in the past on numerous occasions. Information and actual Heroin purchases by the informant ha resulted in the arrest of numerous persons, with (6) six convictions and (8) eight cases pending.

3. On October 9, 1974, the informant working in conjunction with the affiant went to 9356 Mansfield and purchased bulk heroin. The informant stated that he purchased the heroin from a b/m known as "GEORGE" and who is described as being approx 31-33/5-10/170/med bld/med complx/and wearing his hair cut short.

4. On the date indicated the informant prior to entering the premises was searched for narcotics. Search revealed that the informant was not in possession of any narcotics. The informant was then furnished with $25.00 in SS funds for which to make the purchase with. Upon the informants exit from the premises, the informant met with the affiant, and was searched with suspected heroin being recovered. Suspected Heroin was subsequently placed into evidence on LSE #14-72623 and sent to the scientific lab for analysis. Analysis conducted by the scientific lab proved the substance to be heroin.

(Recorder's Court Seal - No. 8370)

SEARCH WARRANT RETURN

Return to Search Warrant

ISSUED UNDER MY HAND THIS 10th DAY OF OCTOBER, 1974.

Dalton A. Roberson
Judge of Recorder's Court for the City of Detroit, County of Wayne, State of Michigan, and a Magistrate

RETURN TO SEARCH WARRANT

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

I hereby certify and return, that by virtue of the within Search Warrant to me directed, I have searched for the goods and chattels therein named, at the place therein described*

(*Strike either (1) or (2), whichever is inapplicable.)

(1) and that I have such goods and chattels before the Court, described as follows:

(Underline denotes handwritten copy)

2 Plastic bags cont. dark powder susp. Heroin

2 Large plastic bags cont. white powder susp. Cocaine

1 Small plastic bag cont. white powder susp. Cocaine

1 Bottle of Dextrose

1 Pack of Mannite Conoscenti — (susp. mix)

1 Execerin bottle cont. 19 capsules

Search Warrant Return

1 Green can cont. susp. Marijuana

1 Plastic bag cont. susp. Marijuana

3 Measuring spoons

4 Needles

2 Syringes

1 Welch scale

1 Hashish pipe

1 Winchester 30.06 w/Bushnell scope

1 BSA pellet gun w/scope

2 Cooking cap

$527 (susp. narcotic proceeds)

1 Erfurt Luger, ser. #7209

(2) Striken

(s) R. Lehman, D.P.D.
Municipal Police Officer

(s) George Summers

DATED AT: 11:00 PM
this 10th day of October
A.D., 1974
Address: 9356 Mansfield

S.L. 5 PAGE 18 79-1794

RECEIVED
JUL 1 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

UNITED STATES OF AMERICA

IN THE SUPREME COURT OF THE UNITED STATES

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

GEORGE SUMMERS,

Respondent.

MICHIGAN SUPREME COURT NO. 58465

MICHIGAN COURT OF APPEALS NO. 22802

DETROIT RECORDER'S COURT NO. 74-07993

MOTION TO PROCEED IN FORMA PAUPERIS

NOW COMES the Respondent, GEORGE SUMMERS, by and through his attorney, GERALD M. LORENCE, and prays this Honorable Court that pursuant to Rule 53 (1) of the Rules of the Supreme Court of the United States, that the Respondent be allowed to proceed in forma pauperis before this Court for the reasons stated in the attached Affidavit.

GERALD M. LORENCE (P 16801)
Attorney for Respondent
2655 Guardian Building
Detroit, Michigan 48226
(313)961-9055

Dated: June 26, 1980

LAW OFFICES
GERALD M. LORENCE
2655 GUARDIAN BUILDING
DETROIT, MICHIGAN 48226
961-9055 (313)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

No. _____

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner

vs.

GEORGE SUMMERS,

Respondent

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, GEORGE SUMMERS, being first duly sworn according to law, depose and say, in support of my Motion For Leave To Proceed without being required to pre-pay costs or fees:

1. I am the Respondent in the above entitled cause.
2. Because of my poverty, I am unable to pay the cost of said cause.
3. I am unable to give security for the same.
4. I believe that I am entitled to the redress I seek in said cause.
5. The nature of said cause is briefly stated as follows:

After an illegal search, I was arrested and charged with possession of heroin. I filed a Motion to Suppress the Evidence and Quash the Information which was granted by

the trial court below. Petitioner appealed to both the Michigan Court of Appeals and the Michigan Supreme Court. Both courts affirmed the trial judge's decision. The People of the State of Michigan now seek certiorari in this Court on the ground that the Michigan Supreme Court's decision was based on an improper interpretation of the Federal Constitution.

GEORGE SUMMERS

Subscribed and sworn to before me this day of , 1980.

MARY ELIZABETH OWIESNY, Notary Public, Macomb County, acting in Wayne County, Michigan.

MY COMMISSION EXPIRES: 8-30-81

79-1794

S.L 5 PAGE 18 No. _____

Supreme Court, U. S.
FILED
JUL 1 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner

vs.

GEORGE SUMMERS,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

GERALD M. LORENCE (P 16801)
Attorney for Respondent
2655 Guardian Building
Detroit, Michigan 48226
(313)961-9055

LAW OFFICES
GERALD M. LORENCE
2655 GUARDIAN BUILDING
DETROIT, MICHIGAN 48226
961-9055 (313)

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner

vs.

GEORGE SUMMERS,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, GEORGE SUMMERS, respectfully requests this Honorable Court to deny the Petition For Writ Of Certiorari, seeking review of the Michigan Supreme Court's opinion in this case.

That opinion is reported at 407 Mich. 432, _____ NW 2d _____ (12/27/79).

LAW OFFICES
GERALD M. LORENCE
2655 GUARDIAN BUILDING
DETROIT, MICHIGAN 48226
961-9055 (313)

QUESTIONS PRESENTED

I

WHETHER THE DECISION OF THE MICHIGAN SUPREME COURT IS BASED UPON A CORRECT INTERPRETATION OF RECENT DECISIONS OF THE UNITED STATES SUPREME COURT.

II

WHETHER A PREMISES SEARCH WARRANT MAY BE EXPANDED TO JUSTIFY A SEARCH OF INDIVIDUALS NOT THEREIN NAMED OR DESCRIBED ABSENT CONDUCT WHICH DIRECTS SUSPICION TO THAT INDIVIDUAL.

III

WHETHER THE APPLICATION OF THE EXCLUSIONARY RULE IS PROPER IN THE CASE AT BAR.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Defendant-Appellee, GEORGE SUMMERS, was charged with possession of certain heroin taken from his person, under a warrant to search premises known as 9356 Mansfield, Detroit, Michigan, by Police Officer Anthony Conant, a member of the raiding party (T. 24). The warrant did not specify persons to be searched; it was based on an Affidavit by a Police Officer Roger Lehman, who participated in the raid. Officer Conant had "seen", but had not read the warrant (T. 32).

When the raiding party came to the home, Officer Lehman saw a person, later identified as Defendant, coming out of the front door. Defendant said he lived in the home (T. 5, 27). The officer instructed Defendant to open the door (T. 5). Defendant replied he had no keys (T. 5), but used an intercom; one Dwight Calhoun answered. The officer identified himself (T. 6) and forced the door open (T. 7). He instructed Officer Conant to bring Defendant Summers into the home (T.34).

The officers searched the house, which contained 5-8 persons, and found suspected heroin in the basement (T. 26, 27). They observed Mr. Calhoun drop a bag of suspected heroin from his person (T. 7,8). Mr. Summers was arrested (T. 8) when suspected heroin was discovered on his person by Officer Conant (T. 9) during a custodial search. It is this heroin that forms the basis for this charge.

Following a preliminary examination, the Defendant was bound over for trial. The trial court subsequently granted a Motion to Suppress and Quash the Information which was affirmed by the Michigan Court of Appeals, 68 Mich. App. 571, 243 N.W. 2d 689 (1976). The Michigan Supreme Court also affirmed, holding that the detention of Defendant while the search was conducted was without probable cause and, therefore, unconstitutional, based on Dunaway v New York, 442 US 200

(1979) and Ybarra v Illinois, 48 U.S.L.W. 4023 (1979). The heroin found in his jacket was thus properly suppressed, being the fruit of an illegal arrest.

REASONS FOR DENYING THE WRIT

I

THE DECISION OF THE MICHIGAN SUPREME COURT IS BASED UPON A CORRECT INTERPRETATION OF RECENT DECISIONS OF THE UNITED STATES SUPREME COURT.

The People would submit in their Petition that the case at bar should be a vehicle for the creation of a "General Recognition" (Petition at 8) of a right to briefly detain persons on premises by the police who have a warrant that does not name or authorize persons to be searched or seized.

Defendant submits that this question was fully considered by this Court in Ybarra v Illinois, 48 U.S.L.W. 4023 (1979), and was rejected; this Court holding that a warrant to search a place cannot normally be construed to authorize a search of each person in that place.

The distinction between "private" and "public" places which the People seek to introduce (Petition at 8) is also not tenable; Fourth Amendment rights inure to persons, not places, Ybarra, supra; Katz v United States, 389 U.S. 347 (1967). Further, such a position flies in the historical basis of the Amendment, which was to accord protection to citizens in their homes from the unwarranted intrusion by the agents of the king.

II

THE ISSUE OF THE APPLICABILITY OF A PREMISES SEARCH WARRANT TO JUSTIFY SEARCH OF INDIVIDUALS NOT THEREIN NAMED OR DESCRIBED HAS BEEN DECIDED BY THIS COURT, AND A WARRANT CANNOT BE EXPANDED AS PROFERRED BY THE PEOPLE TO JUSTIFY A SEARCH OF AN INDIVIDUAL ABSENT CONDUCT WHICH DIRECTS SUSPICION TO THAT INDIVIDUAL.

This Courts' decision in Ybarra v Illinois, supra disposes of the second alleged basis for granting Certiorari in this case. In Ybarra, police obtained a search warrant for a bar and an named person. They entered the bar, Ybarra (not the person named in the warrant) was a customer. The officers know nothing about him, and he exhibited no behavior which would lead them to believe he was armed or would pose a threat. A "pat down" revealed a cigarette package containing heroin.

This Court held that a premises search warrant does not, without more, extend to persons not named therein found on the premises. This Court also continued the tradition of regognizing that Fourth Amendment rights are personal, and police conduct must be evaluated on an individual level, Katz v United States, supra.

The case at bar must be evaluated on this basis. Defendant is observed by officers coming out of the house. He has no bag, briefcase or other container likely to contain contraband. He is not a person named or described in the warrant. He cooperates with the officers, who have no reason to believe he is armed or a threat, or is committing a felony.

At this point in time, the officers had no right to arrest Defendant, or to conduct a "pat down". He should have been allowed to go. Yet, without authority from the warrant, or their observation, he is detained.

It is directly from this unlawful detention that the subsequent intrusion of the person of Defendant is based. The warrant-based permises search finds heroin. Defendant is then searched and heroin is found on his person. This heroin froms the basis of a criminal charge against Defendant.

However, but for the unlawful detention of Defendant, he would not have been on the premises when the heroin was

found[1], and the police would not have been in a position to invade his person.

The case at bar presents a classical application of the "fruit of the poisonous tree" doctrine, barring the use of evidence obtained in direct violation of Fourth Amendment restraints, Silverthorne Lumber Co. v United States, 251 U.S. 385 (1920); Wong Sun v United States, 371 U.S. 471 (1936).

The case was correctly analyzed and decided by the State Courts and certiorari is not warranted.

III

THERE BEING NO BASIS FOR THE SEIZURE OF THE EVIDENCE OTHER THAN THE UNLAWFUL CONDUCT OF THE POLICE, THE EVIDENCE MUST BE SUPPRESSED AS "THE FRUIT OF THE POISONOUS TREE".

It is an accepted principle of constitutional law that evidence, directly or indirectly the product of a violation of the Fourth Amendment is excluded at trial, Wong Sun v United States, supra; Silverthorne Lumber Co. v United States, supra.

In the case at bar, the accused was in police custody and subject to search only as a result of his illegal detention outside the dwelling and then being forced to re-enter and remain there during the search. Therefore, the material seized from Defendant is proffered by the People as a direct violation of criminal law.

This Court has not failed to apply the exclusionary rule to those police practices or alleged basis of authority which

---

[1]It should be carefully pointed out that the association of Defendant with the premises might justify the issuance of a warrant for his arrest, which arrest might include a search of his person and the area under his immediate control, C.F. Chimel v California, 395 U.S. 752, (1969). That issue is not before the Court, given the facts of the case, but is noted to refute any implication that, except by police conduct of the type here described, Defendant could not be brought before the Bar of Justice.

purport to authorize searches without probable cause, see authorities cited in Ybarra, supra at 4026 n. 11, distinguishing cases where the underlying offense, as opposed to the basis of the search, is found unconstitutional. The People make no compelling showing to justify departure from the "long prevailing constitutional standard" representing "'the best compromise that has been found for accommodating the often opposing interests' in 'safeguard[ing] citizens from rash and unreasonable interferences with privacy' and in 'seek[ing] to give fair leeway for enforcing the law in the community's protection.'" Ybarra v Illinois, supra at 4026, quoting Brinegar v United States, 338 U.S. 160 (1949). See authorities in Ybarra, supra at 4026, n. 10.

CONCLUSION

It is respectfully submitted that for the reasons outlined above, the Petition for Certiorari should be denied.

Respectfully submitted,

GERALD M. LORENCE (P 16801)
Attorney for Respondent
2655 Guardian Building
Detroit, Michigan 48226
(313)961-9055

Supreme Court, U.S.
FILED
NOV 26 1980
MICHAEL RODAK, JR., CLERK

No. 79-1794

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner

v.

GEORGE SUMMERS
Respondent

ON WRIT OF CERTIORARI TO
THE MICHIGAN SUPREME COURT

BRIEF FOR PETITIONER

WILLIAM L. CAHALAN
Prosecuting Attorney
County of Wayne
State of Michigan

EDWARD REILLY WILSON
Principal Attorney, Appeals

TIMOTHY A. BAUGHMAN
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5794

QUESTIONS PRESENTED

I.

DO DUNAWAY v NEW YORK AND YBARRA v ILLINOIS COMPEL THE CONCLUSION, AS THE MICHIGAN SUPREME COURT HELD THEY DO, THAT THE "STANDARD FOR DETERMINING WHETHER A SEIZURE-DETENTION IS LEGAL IS NOT WHETHER THE POLICE OFFICER'S ACTIONS WERE REASONABLE UNDER THE CIRCUMSTANCES BUT RATHER WHETHER THE POLICE OFFICER HAD PROBABLE CAUSE TO ARREST"?

II.

DOES A SEARCH WARRANT FOR PRIVATE PREMISES AUTHORIZE A SEARCH OF REASONABLE SCOPE AND INTENSITY OF PERSONS ON THE PREMISES WHERE THE ITEMS PARTICULARIZED IN THE WARRANT MIGHT REASONABLY BE EXPECTED TO BE CONCEALED ON THE PERSON?

III.

WHERE THE JUDGES OF THE COURTS THAT HAVE CONSIDERED THE OFFICERS' CONDUCT HAVE SPLIT 7-5 OVER WHETHER THAT CONDUCT WAS PERMISSIBLE UNDER THE CONSTITUTION, CAN IT BE SAID THAT THE OFFICERS KNEW, OR SHOULD HAVE KNOWN, THAT THEIR CONDUCT WAS NOT PERMISSIBLE UNDER THE FOURTH AMENDMENT, SO THAT THE EXCLUSIONARY RULE SHOULD BE APPLIED?

TABLE OF CONTENTS

Questions Presented i

Index of Authorities v

Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provisions Involved 1

Statement of the Case 2

Summary of Argument 4

Argument

I.

THE DETENTION OF RESPONDENT WHILE THE PREMISES WERE SEARCHED PURSUANT TO WARRANT WAS REASONABLE AND THEREFORE CONSTITUTIONAL. 6

II.

A SEARCH WARRANT FOR PRIVATE PREMISES PERMITS A SEARCH OF REASONABLE SCOPE AND INTENSITY OF PERSONS ON THE PREMISES WHERE THE ITEMS PARTICULARIZED IN THE WARRANT MIGHT REASONABLY BE EXPECTED TO BE CONCEALED ON THE PERSON. 17

III.

WHERE THE JUDGES OF THE COURTS THAT HAVE CONSIDERED THE OFFICERS CONDUCT HAVE SPLIT 7-5 OVER WHETHER THAT CONDUCT WAS PERMISSIBLE UNDER THE CONSTITUTION, IT CANNOT BE SAID THAT THE OFFICERS KNEW, OR SHOULD HAVE KNOWN, THAT THEIR CONDUCT WAS NOT PERMISSIBLE UNDER THE FOURTH AMENDMENT, SO THAT THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED. 33

Conclusion 39

INDEX OF AUTHORITIES

Cases	Page
Brown v Illinois, 422 US 590 (1975)	35
Brown v United States, 411 US 223 (1973)	36
Burdeau v McDowell, 256 US 465 (1921)	36
Camara v Municipal Court, 387 US 523 (1967)	7
City of Olympia v Culp, 240 P 360, 361 (1925)	13
City of Tacoma v Mondell, 495 P 2d 682 (Wash App, 1972)	30
Commonwealth v Smith, 348 NE 2d 101 (1976)	29
Commonwealth v Snow, 298 NE 2d 804 (Mass, 1973)	28, 29
Davis v Mississippi, 394 US 721 (1969)	12
Delaware v Prouse, 440 US 648 (1979)	8, 10
Draper v United States, 358 US 307 (1959)	16
Dunaway v New York, 442 US 200 (1979)	4, 7, 8 11, 12

Elkins v United States,
364 US 206 (1960) 35, 36

Fuller v Alaska,
393 US 80 (1968) 36

Go-Bart Co. v United States,
282 US 344, 356-357 (1931) 6

Guerra v State,
496 SW 2d 92 (Ct App Tex, 1974) 29

Gustafson v Florida,
414 US 260 (1973) 16

Harris v New York,
401 US 222 (1971) 36

Katz v United States,
389 US 347, 357 (1967) 7

Linkletter v Walker,
381 US 618 (1965) 36

Marshall v Barlows, Inc.,
436 US 307 (1978) 6, 7

Martinez v State,
504 SW 2d 897 (Ct App Tex, 1974) 29

Michigan v DeFillippo,
___ US ___; 61 L Ed 2d 343 (1979) 16

Michigan v Tucker,
417 US 433, 446 (1974) 35

Payton v New York,
___ US ___; 63 L Ed 2d 639, 649 (1980) 6, 7

Pennsylvania v Mimms,
434 US 106 (1977) 8, 9
11, 14

People v Harrison,
226 NE 2d 418 (1967) 28

People v Harvey,
38 Mich 39; 195 NW 2d 773 (1972) 31

People v Kielczynski,
264 NE 2d 767 (Ill App, 1970) 28

People v Lujan,
484 P 2d 1238 (Colo, 1971) 30

People v McHale,
281 NE 2d 776 (1972) 28

People v Pugh,
69 Ill App 2d 312, 217 NE 2d 557 (1966) 28

People v Summers,
407 Mich 432, 446;
286 NW 2d 226, 228 (1979) 14

Scott v United States,
436 US 128, 138 (1978) 18, 33, 34

See v City of Seattle,
387 US 541 (1967) 7

South Dakota v Opperman,
428 US 364, 370, n.5 (1976) 7

State v Dearinger,
439 P 2d 971 (Wash, 1968) 19, 20

State v Kurtz,
612 P 2d 749 (Or App, 1980) 27

State v Loudermick,
494 P 2d 1174 (Kansas, 1972) 29

State v McClelland,
523 P 2d 357 (Kansas, 1974) 29

State v Ryan,
1 P 2d 893 (Wash, 1931) 13

State v Smith,
552 P 2d 1059 (Wash App, 1976) 19, 20

State v Valdez,
577 P 2d 564, 567 (NM Ct App, 1978) 13

Stone v Powell,
428 US 465, 486 (1976) 34, 35, 36

Terry v Ohio,
392 US 1 (1968) 7, 8, 11

United States v Brignoni-Ponce,
422 US 873 (1975) 8, 9, 11

United States v Calandra,
414 US 338, 348 (1974) 34, 35

United States v Di Re,
332 US 581 (1947) 30, 31

United States v Janis,
428 US 433, 446 (1976) 34

United States v Johnson,
475 F 2d 977 (CS DC, 1973) 22, 25

United States v Kralik,
611 F 2d 343, 345 (CA 10, 1979) 30

United States v Martinez-Fuerte,
428 US 543 (1976) 9, 11

United States v Micheli,
487 F 2d 429, 430 (CA 1, 1973) 13, 23, 26

United States v Peltier,
422 US 531 (1975) 5, 34, 36

United States v Robinson,
414 US 218 (1973) 16

United States v Santana,
427 US 38 (1976) 7

United States v Teller,
397 F 2d 494 (CA 7, 1968),
cert den, 393 US 937 (1968) 24

United States v Watson,
423 US 411 (1976) 7

United States v Williams,
F 2d (CA 5, 1980) 33

Walder v United States,
347 US 62 (1954) 36

Weeks v United States,
232 US 383 (1913) 35

Wong Sun v United States,
371 US 471 (1973) 15

Ybarra v Illinois,
___ US ___;
62 L Ed 2d 238, 251 (1980) 4, 6, 13
22, 25, 31

Other Sources

3 LaFave, Search and Seizure 12, 13

MCL 780.656 31

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 68 Mich App 571; 243 NW 2d 689 (1976). The opinion of the Michigan Supreme Court is reported at 407 Mich 432; 286 NW 2d 226 (1979). Rehearing was denied on February 29, 1980.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on April 26, 1976. The judgment of the Michigan Supreme Court was entered on December 27, 1979 (rehearing denied on February 29, 1980). The jurisdiction of this Court is invoked under 28 USC sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On October 10, 1974, a team of Detroit Police Officers was dispatched to execute a warrant to search premises located at 9356 Mansfield in Detroit (J.A. 6). The warrant was issued to search the entire premises and seize Heroin and any other narcotics and narcotics paraphernalia (J.A. 60). The warrant recited that an informant had previously purchased Heroin at the Mansfield address from a black male known as "George" (J.A. 60-61).

Upon arriving at the premises named in the warrant, police officers Lehman and Conant observed respondent leave the premises to be searched through the front door and proceed down the front porch steps (J.A. 6, 25). Officer Lehman approached respondent, identified himself as a police officer, and asked respondent if he lived in the house he had just exited (J.A. 6). Upon respondent's affirmative response, Officer Lehman showed him the search warrant and asked if he could open the door (J.A. 6). Respondent replied that he could not because he had left his keys inside, but he could ring someone over the intercom (J.A. 6).

One Dwight Calhoun opened the inner door upon respondent's request, but when Officer Lehman identified himself as a police officer and attempted to open the storm door (which was locked) Calhoun slammed the inner door shut in his face (J.A. 7-8). The door was then forced, and Officer Lehman instructed Officer Conant to bring respondent into the living room, where he and seven other persons in the house were detained while the search was conducted (J.A. 16, 27-29).

A search of the premises revealed two plastic bags of suspected Heroin under the bar in the basement (J.A. 24). It having been determined that respondent was the owner of the premises, he was formally arrested on the narcotics charge. A custodial search of

his person followed, revealing a plastic bag of Heroin in his jacket pocket (J.A. 24). It was for possession of this Heroin that respondent was ultimately charged.

Following a preliminary examination, respondent was bound over for trial. The trial judge granted a motion to suppress the evidence and quashed the information. The Michigan Court of Appeals affirmed the trial court, 68 Mich App 571; 243 NW 2d 689 (1976), and on December 27, 1979, the Michigan Supreme Court also affirmed, holding that the detention of respondent while the search was conducted was without probable cause, and, therefore, based on Dunaway v New York and Ybarra v Illinois, unconstitutional. The Heroin found in his jacket was thus properly suppressed, being the fruit of an illegal arrest. Three justices dissented, finding that the majority had employed the wrong standard in reviewing the officers' conduct and concluding that the temporary detention was reasonable and therefore constitutional. The dissenting justices found Dunaway and Ybarra to be distinguishable.

SUMMARY OF ARGUMENT

In this cause the Michigan Supreme Court held that the "general standard for determining whether a seizure-detention is legal is not whether the police officers actions were reasonable under the circumstances, but rather whether the police officer had probable cause to arrest" (emphasis in original). 407 Mich at 446; 286 NW 2d at 228. The court thus found the detention of respondent while his dwelling was searched pursuant to warrant to be unconstitutional under Dunaway v New York, 442 US 200 (1979).

It is petitioner's position that seizures of the person are governed by the reasonableness clause of the Fourth Amendment, and that the Michigan Supreme Court erred in holding otherwise. Reasonableness entails a balancing of the individual's Fourth Amendment interest against arbitrary intrusions and the public interest involved in the particular seizure. Such balancing can and should be done on a generic or categorical basis to give guidance to both police officers and judges. The detention of persons on (or departing from) premises to be searched pursuant to warrant while the warrant is executed should be recognized as reasonable. The detention of respondent was reasonable, and the discovery of the Heroin on his person proper as fruit of a search incident to arrest once Heroin was discovered in his basement.

Petitioner also contends that there is an independent justification for the search of respondent; that is, his person was included within the warrant. A search warrant for private premises should allow a search of reasonable scope and intensity of persons on the premises where the items named in the warrant might reasonably be expected to be concealed on the person. Ybarra v Illinois, ___ US ___; 62 L Ed 2d 238 (1980) does not compel a different result. The present case is distinguishable in that it involves a private dwelling rather than a place of public accommodation. While it may not be reasonable to believe patrons of a bar

would have an interest in the items named in the warrant or in frustrating the warrant, such a belief regarding those present in a private dwelling is reasonable. Further, respondent here had a relationship to the premises (owner) which Ybarra did not, rendering his search all the more reasonable.

Even if this Court finds the officers' conduct to have been unconstitutional, it was nevertheless undertaken in a good faith reasonable belief that it was proper. It certainly cannot be said that the officers knew or should have known that their conduct was violative of the Fourth Amendment. See United States v Peltier, 422 US 531 (1975). To exclude the truth in these circumstances would serve no useful purpose and would inflict gratuitous harm on the public interest.

ARGUMENT

I.

THE DETENTION OF RESPONDENT WHILE THE PREMISES WERE SEARCHED PURSUANT TO WARRANT WAS REASONABLE AND THEREFORE CONSTITUTIONAL.

A. A Detention Far Less Intrusive Than An Arrest To Answer For A Crime Does Not Require A Showing Of Probable Cause, But Is Constitutional If Found Reasonable When The Competing Interests Of the Individual And Society Are Balanced.

The Fourth Amendment assures that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The Amendment contains two separate and independent clauses, joined by the conjunction "and," each "prohibiting a category of governmental conduct." Marshall v Barlows, Inc., 436 US 307 (1978), Justice Stevens dissenting; Ybarra v Illinois, ___ US ___; 62 L Ed 2d 238, 251 (1980), Justice Rehnquist dissenting; Go-Bart Co. v United States, 282 US 344, 356-357 (1931); Payton v New York, ___ US ___; 63 L Ed 2d 639, 649 (1980). In the case of searches, the warrant clause and the reasonableness clause are ordinarily wedded; that is, with certain specifically established and well-delineated exceptions, warrantless searches are

per se unreasonable. Katz v United States, 389 US 347, 357 (1967). Moreover, within the warrant clause, the warrant requirement is linked "textually . . . to the probable-cause concept." South Dakota v Opperman, 428 US 364, 370, n.5 (1976); but see Marshall v Barlows, supra, Camara v Municipal Court, 387 US 523 (1967); See v City of Seattle, 387 US 541 (1967). Seizures of the person, however, have not been viewed as falling inevitably within the warrant clause; indeed, a warrant requirement for an arrest is the exception rather than the rule.[1] See United States v Watson, 423 US 411 (1976); United States v Santana, 427 US 38 (1976); Payton v New York, supra. Petitioner submits, then, that seizures of the person must be judged under the reasonableness clause, and while arrests to answer for a crime, or detentions not materially less intrusive than an arrest to answer for a crime, must be viewed as unreasonable unless supported by probable cause in the traditional sense, Dunaway v New York, 442 US 200 (1979), less intrusive classes of detentions may be deemed reasonable even if unsupported by probable cause to hold the person to answer for a crime. Terry v Ohio, 392 US 1 (1968). The Michigan Supreme Court erred in holding that:

> . . . the general standard for determining whether a seizure-detention is legal is not whether the police officers actions were reasonable under the circumstances but rather whether the police officer had probable cause to arrest (emphasis by the court). People v Summers, 407 Mich 432, 446; 286 NW 2d 226, 228 (1979).

The detention of persons on (or in the process of departing from) premises to be searched under warrant while the warrant is executed is reasonable and therefore constitutional.

This Court has stated time and again that "The touchstone of our analysis under the Fourth Amendment

is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' " Pennsylvania v Mimms, 434 US 106 (1977); quoting Terry v Ohio, supra at 19. See also Delaware v Prouse, 440 US 648 (1979); United States v Brignoni-Ponce, 422 US 873 (1975). Dunaway v New York, supra, relied on almost exclusively by the Michigan Supreme Court for its decision, did not overrule this authority, either explicitly or impliedly, holding only that "detention for custodial interrogation — regardless of its label — intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." 442 US at 216. This holding is not inconsistent with petitioner's position, for the detention here was much less severe an intrusion than that in Dunaway.

Of course, the watershed case recognizing that detentions which involve an intrusion on individual security less severe than an arrest to answer for a crime may be accomplished absent information arising to the level of probable cause to arrest is Terry v Ohio, supra. In allowing an officer to make an investigative stop on reasonable suspicion that criminal activity is afoot, and a frisk on reasonable suspicion that the individual stopped is dangerous, this Court rejected petitioner Terry's argument that the law of arrest, requiring probable cause, had already worked out the balance between the government's interest in the intrusion and the individual's interest in personal security. The argument was rejected because the governmental interests involved in an arrest and a stop are not identical, nor is the individual's interest in his personal security identical, as one intrusion is much more severe. An arrest is "a wholly different kind of intrusion upon individual freedom" than a stop or a temporary detention in the place where a search warrant is being executed. It is ". . . the initial stage of a criminal prosecution . . . . , is intended to vindicate

society's interest in having its laws obeyed, and . . . is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows." 392 US at 26. This Court held that its "evaluation of the proper balance that has to be struck in this type of case" led to the conclusion that the sort of conduct engaged in by Officer McFadden was proper when "tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." 392 US at 20, 27.

In United States v Brignoni-Ponce, supra, this Court again gauged the propriety of a particular class of seizures under the Fourth Amendment by assessing their reasonableness, with reasonableness being determined by striking "a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." 422 US at 878. At issue was the authority of United States Border Patrol officers to stop automobiles for the sole purpose of questioning the occupants regarding their citizenship and immigration status. This Court weighed the valid public interest in preventing illegal entry against the "modest" intrusion involved in the momentary stop of an auto to question the occupants, and held that such stops are permissible under the Fourth Amendment where based on a reasonable suspicion that the vehicle may contain aliens who are illegally in this country. 422 US at 881. Similarly, in United States v Martinez-Fuerte, 428 US 543 (1976) this Court "weighed the public interest against the Fourth Amendment interest of the individual," 428 US at 554, in holding that routine automobile stops at a border checkpoint are constitutional under the Fourth Amendment even "in the absence of any individualized suspicion. . . ." 428 US at 562.

A different sort of seizure was tested for reasonableness in Pennsylvania v Mimms, supra. The question presented was whether it is "reasonable and

thus permissible under the Fourth Amendment" for a driver of an automobile lawfully stopped for a traffic violation to be ordered out of the auto. Balancing the state's interest, the safety of the officer, against what is at most a "mere inconvenience" to the individual, this Court approved the practice.

The police conduct in question in Delaware v Prouse, supra, was random automobile stops for the purpose of checking automobile registrations and driver's licenses. Observing that "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by . . . law enforcement agents . . . . ," 440 US at 653, and that whether a particular police practice is reasonable and hence constitutional is "judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests," 440 US at 654, the Court found the governmental interest insufficient to justify allowing the wholly discretionary intrusion, though reserving whether similar stops would be justified if not left to the unbridled discretion of the individual officer (e.g. roadblocks, and fixed checkpoint stops for registration and license checks).

The teaching of these cases is consistent and clear. Classes of detentions are viewed as constitutional if reasonable. Reasonableness is determined by balancing the governmental interest served by the detention against the individual's interest in personal liberty. The more severe the intrusion, the more information and the greater the governmental interest required to justify it. Arrests, the most severe intrusion, require the greatest degree of information -- probable cause. Stops, a lesser intrusion, are justified by the state's interest in effective crime prevention and detection, and require a showing of reasonable suspicion. Fixed checkpoint stops at borders are justified by the interest in preventing illegal entry into

the country, and, because the intrusion is very slight, require no showing of individualized suspicion. What, then, of Dunaway v New York, relied upon so heavily by the Michigan Supreme Court? Did it abolish the balancing test for reasonableness?

It must be remembered that the precise question in Dunaway was "the legality of custodial questioning on less than probable cause for a full-fledged arrest," 442 US at 202, and the precise holding that "The Rochester police violated the Fourth and Fourteenth Amendments when, without probable cause, they seized petitioner and transported him to the police station for interrogation." 442 US at 216. Further, probable cause was found necessary to support the intrusion in Dunaway because of the severity of the intrusion: "the detention of petitioner was in important respects indistinguishable from a traditional arrest" (emphasis added). 442 US at 212. Although there is dicta in Dunaway which "might be read to indicate that Terry v Ohio . . . is an almost unique exception to a hard-and-fast standard of probable cause," 442 US at 219, Justice White concurring, the facts, issue, and holding of the case do not compel the conclusion that probable cause to support an arrest is necessary to justify the detention even in the instance of a substantially less severe intrusion and a different governmental interest than involved in detention for custodial interrogation. The teaching of Terry, Mimms, Brignoni-Ponce, Martinez-Fuerte and other cases is precisely to the contrary.

Although theory perhaps supports the proposition that probable cause is a sliding scale which in each and every case must be measured against the degree of the intrusion and the significance of the governmental interest in achieving it, petitioner does not argue for such a position. Indeed, petitioner agrees that such a balancing test is "too subtle and sophisticated a device to be workable in day-to-day practice," and that "it is

clearly asking too much to expect policemen to make on-the-spot judgments in this way or, indeed, to require trial judges to review police conduct in this fashion." 3 LaFave, Search and Seizure, p. 14. Rather, petitioner submits that the balancing test is appropriate "as a technique for establishing the quantum of evidence needed for certain distinct kinds of official action" (emphasis added). LaFave, supra. As cogently put by Justice White concurring in Dunaway, in the main balancing must be done on a categorical basis in order to provide the police and courts with workable rules. But the balancing test allows for the "generic recognition" of classes of detentions which are reasonable on lesser information than probable cause "where more flexibility is essential." 442 US at 220.

The balancing test as a method of assessing reasonableness is essential precisely because detentions take on a myriad of forms, some of which are reasonable though not falling within the confines of either arrest or stop. The existence of a test allowing flexibility is necessary to validate these detentions where appropriate, and allow the continued development of the law and reasonable police practices. For example, though yet to rule on the question, in Davis v Mississippi, 394 US 721 (1969) this Court suggested the possibility that a certain class of detentions at the police station might be permissible on information not arising to probable cause to arrest — detentions for fingerprinting, where the reliability of the practice as a crime solving tool is high, and the intrusion much less serious than arrests to answer for a crime (or "arrests" for interrogation). Based on this language a number of statutes have been enacted providing for a narrowly drawn authority for detentions for the purpose of obtaining evidence of identifying physical characteristics on less than probable cause to arrest.[2] Such statutes and detentions have been consistently upheld by reviewing courts.[3] Dunaway should not be read as disallowing the "generic

recognition" of this class of reasonable detentions.[4] See LaFave, supra, 1980 Supp, p. 14-17.

Petitioner submits that the present case is appropriate for generic recognition of a category of reasonable detentions on less than probable cause to arrest; that is, detentions of persons on (or departing from) premises to be searched pursuant to warrant until the search is completed. Case law in the area is scant, as most cases deal with the question of the permissibility of frisks of persons on premises to be searched pursuant to warrant, and uphold such frisks, thereby deciding sub silencio the propriety of the detention.[5] Although the validity of these cases on the frisk question is subject to some doubt given this Court's holding in Ybarra v Illinois, supra, Ybarra does not stand for the proposition that those on premises to be searched pursuant to warrant may not be detained until the search is completed. One federal circuit has held such a claim to be "clearly frivolous." United States v Michell, 487 F 2d 429, 430 (CA 1, 1973). See also State v Valdez, 577 P 2d 564, 567 (NM Ct App, 1978); City of Olympia v Culp, 240 P 360, 361 (1925); State v Ryan, 1 P 2d 893 (Wash, 1931).

The governmental interest in allowing such detentions is valid and weighty; the safety of the officers and avoidance of the frustration of the warrant. Particularly where the object of the warrant is easily secreted or destroyed there is strong justification for not allowing those present on the premises to roam about at will. The warrant itself also represents a valid governmental interest in obtaining evidence of crime where a judicial officer has commanded the intrustion into the premises and the search on the basis of probable cause. Moreover, as stated by the dissenting justices in the Michigan Supreme Court, "we recognize the fact that armed violence not infrequently accompanies the use of or traffic in narcotics — a fact well-known to the police.

Cf People v Nefzger, 173 Colo 199, 200-201; 476 P 2d 995, 996 (1970)." People v Summers, 407 Mich at 460; 286 NW 2d at 235 (1979). Whatever the object of the search, the government's interest in controlling the situation while the warrant is executed outweighs the inconvenience caused the persons temporarily detained, who are only compelled to stay further in a place they have chosen to frequent (in this case, respondent was compelled only to remain only in his own home). Given this modest intrusion, a valid governmental interest, and a prior judicial determination that there is probable cause to believe that items in some way connected to criminal activity are on the premises, the detention should be viewed as "reasonable and thus permissible under the Fourth Amendment." Mims, supra.

B. The Case At Bar.

The instant case falls within petitioner's proposed generic class. Respondent was seen to depart the premises to be searched as the officers approached. Before he was detained it was known that he had keys to and indeed lived in the premises from which Heroin had been sold, and that he knew the officers were going to search the premises (he was shown the warrant). The person answering the door had slammed it shut upon learning the officers' authority and purpose. The governmental interests in respondent's detention outlined above obtain, and the intrusion involved in causing him to cross his own threshold and remain in his own house while the search was conducted was minimal. As the dissenting justices in the Michigan Supreme Court observed, the police were confronted with a situation where an "inhabitant of a house where trafficking in drugs was allegedly conducted might escape to summon aid or himself interfere with the execution of the warrant." 407 Mich at 459; 286 NW 2d at 235. Though a search and/or detention cannot be justified by its fruits, in assessing the legitimacy of the concern of officers for their safety when executing

search warrants it should be noted that discovered in the search was one 30.06 Winchester with Bushnell scope, one BSA pellet gun with scope, and one Erfurt Luger, and that there were eight people on the premises. The detention of respondent was reasonable and thus constitutional.

Once it is recognized that the detention of respondent was proper then it plainly follows that he was arrested upon probable cause after the discovery of the Heroin in his basement. Though the Michigan Supreme Court majority did not reach the probable cause question, viewing respondent's arrest and the seizure of the Heroin in his pocket as fruit of an illegal detention, it is clear, as the dissenting justices would have held, that the Michigan Court of Appeals majority assessed probable cause under the wrong standard.

The Michigan Court of Appeals majority found respondent's arrest after the discovery of the Heroin in his basement to have been without probable cause because, based on Michigan law,[6] respondent could not have been convicted of possession of the Heroin found in the basement. The court stated that in order to find probable cause to arrest there "must be some evidence of the type or quality necessary to support a conviction." This is clearly incorrect. In reviewing the probable cause question this Court said in Wong Sun v United States, 371 US 471 (1973) that:

> It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion . . . though the arresting officer need not have in hand evidence which would suffice to convict. The quantum of information which would 'warrant a man of reasonable caution in the belief' that a felony has been committed . . . , must be measured by the facts of the particular case (emphasis added).

See also Michigan v DeFillippo, ___ US ___; 61 L Ed 2d 343 (1979).

Analyzing the instant case not under a sufficiency of the evidence to convict standard, but asking whether the officers possessed such information as would lead a reasonably discreet and prudent man to believe that a felony has been or was being committed, keeping in mind "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," Draper v United States, 358 US 307 (1959), petitioner submits that the answer must be that probable cause did exist. A reasonably discreet and prudent man, faced with circumstances apparent to the officers in this case, would believe that respondent controlled the Heroin found in his basement. There being, then, probable cause to arrest, the Heroin found in respondent's jacket pocket was the product of a search incident to arrest. United States v Robinson, 414 US 218 (1973); Gustafson v Florida, 414 US 260 (1973). This Court should find that probable cause existed, or, if the Court finds the detention lawful, remand to the Michigan Supreme Court to determine the probable cause issue.

Argument

II.

A SEARCH WARRANT FOR PRIVATE PREMISES PERMITS A SEARCH OF REASONABLE SCOPE AND INTENSITY OF PERSONS ON THE PREMISES WHERE THE ITEMS PARTICULARIZED IN THE WARRANT MIGHT REASONABLY BE EXPECTED TO BE CONCEALED ON THE PERSON.

Respondent in this case was observed by police officers leaving premises to be searched pursuant to warrant. He was shown the warrant and indicated that he had keys to the dwelling but that they were inside. The person who eventually answered the door slammed it shut upon the officers' announcement of their purpose and authority. After the door was forced, respondent was brought into the house. It was this detention, bringing respondent into his home and requiring him to remain while the warrant was executed, which the Michigan Supreme Court found violative of the Fourth Amendment, not because it was unreasonable, but because it was unsupported by probable cause (see Issue I, supra).

Respondent was arrested after Heroin was found in his basement, and the Heroin which was found in his jacket (and which formed the basis of the charge against him) was found in a search incident to that arrest. Petitioner submits that there is an independent justification for the seizure of the Heroin from respondent; that is, it was properly seized pursuant to the execution of the search warrant. It is of no moment that the officers did not search respondent on this basis, for this Court has held that ". . . the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal

justification for (his) action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." Scott v United States, 436 US 128, 138 (1978).

A. Respondent Was On The Premises.

The Michigan Supreme Court, though granting leave on the issue, did not resolve the question of whether a premises directed search warrant allows a search of reasonable scope and intensity of persons on the premises where the items named in the warrant might reasonably be expected to be concealed on the person. In this the court erred, as even if it is true that respondent's detention cannot be justified as incident to the execution of the warrant (but see Issue I, supra), the detention is certainly justifiable if his person is viewed as within the scope of the warrant.

With regard to this question the Michigan Court of Appeals stated:

> Our courts have never explored the extent to which persons found upon the premises as a search warrant is executed can be searched without another warrant. This is not the occasion to decide that issue, for all the cited cases require at the very least presence upon the premises searched. That factor cannot be found here. The defendant was stopped outside of the house. There hardly could be any items on his person which were subject to the search warrant, since the items too were outside the designated premises. Taking defendant back inside did not change the situation. Even if the police acted legally in doing so, an issue we do not decide here, failure to search defendant's person certainly would not 'frustrate' the execution of the warrant. There could be little fear that items in the house would be taken and concealed by

> defendant, who was being detained and watched by Officer Conant. People v Summers, 68 Mich App 571, 579-580; 243 NW 2d 689, 692-693 (1976).

Petitioner disagrees that the factor of "presence" is not to be found in the instant case. When a container (in this case a person with pockets) is seen to leave the premises by officers who are on the scene to execute a search warrant, and that container is easily able to contain within it the items named in the search warrant, the search warrant also authorizes a search of the container. It simply makes no sense to say that containers which would be within the scope of the warrant fall without it if they depart the premises under the very eyes of the executing officers.

The logic of the position that containers which are seen by officers to leave the premises described in the search warrant, and which are likely repositories of the items to be seized, may be searched and seized pursuant to the warrant, is seen in State v Dearinger, 439 P 2d 971 (Wash, 1968), followed in State v Smith, 552 P 2d 1059 (Wash App, 1976). In Dearinger, officers arriving at a house to execute a search warrant for the premises heard something fall to the ground and discovered a man's sock in the neighboring yard. In the sock were bottles containing narcotics. The claim was made that the seizure and search of the sock was beyond the scope of the warrant as the sock was not on the premises described in the warrant. The court held:

> Where, during the lawful search of a building, the physical senses of the officers lawfully on the premises apprise them that occupants of the searched premises have, during or immediately preceding the search, thrown or removed something from the particular premises, if an article is found and taken during the search in such a place and under such circumstances as to leave a reasonable inference that it had been

thrown or placed there during or immediately prior to the search, it constitutes a seizure on or within the premises designated in the warrant (emphasis added). 439 P 2d at 973.

Similarly, in State v Smith, supra, officers executing a search warrant of premises for narcotics heard the toilet flush. A search of the septic tank revealed 15.6 grams of packaged Heroin. The search of the septic tank and seizure of the Heroin was challenged on the ground that the search exceeded the scope of the warrant, which was for premises. Quoting Dearinger, the court found the search to be within the scope of the warrant.

In the instant case, respondent was seen to leave the house by the officers who had arrived to execute the warrant. His person (pockets, etc.) was a place, or contained places, where the items named in the warrant — narcotics — might easily be concealed. The logical consequence of the statement by the majority in the Michigan Court of Appeals that "there hardly could be any items on his person which were subject to the search warrant, since the items too were outside the designated premises" is that a person within the premises may frustrate the execution of a search warrant by hurling a container holding the items named in the search warrant out of the building, even under the eyes of the searching officer. The container could not be searched, because any items in it would be outside the premises. When a ruling of law leads to absurd results, the premises of that ruling are suspect. Respondent was seen by the officers to leave the premises named in the search warrant. The subsequent search of his person must be viewed as within the scope of the warrant, if a search of the person pursuant to a warrant for premises is permissible. The Michigan Court of Appeals erred in viewing respondent's observed departure from the named premises as mooting the issue of the "extent to which persons found upon the

premises as a search warrant is executed can be searched without another warrant."

B. The Relationship Of The Person To The Premises Test.

The Michigan Court of Appeals majority rejected petitioner's argument that since the clothing of respondent was a place where Heroin could be located, the search warrant for premises included within it a search of reasonable scope and intensity of his person, as a person present on the premises, saying:

> The prosecutor misses the point of the statute. MCLA 780.651; MSA 28.1259(1) only authorizes a magistrate to issue warrants to search certain places. Once a warrant has actually been issued, it cannot be broadly interpreted. A search warrant must describe the premises to be searched and the property to be seized with particularity, and the executing officers must narrowly follow the description. . . It is true that the magistrate could have issued a warrant to search any individual found on the premises, but he did not do so. The 'particularity' requirement prevented the police from legally extending the scope of the warrant so as to authorize a search of defendant's person. 68 Mich App at 579; 243 NW 2d at 692.

Petitioner submits that this analysis begs the question, for the precise issue is whether a search of a person pursuant to a search warrant for premises is an extension of the scope of the warrant. Petitioner contends that just as it is clear that a search warrant for premises need not specify and describe every container, every piece of furniture, within the premises in which the items to be seized might be secreted, neither must it necessarily specify and describe

persons. A search of desk drawers and closets for narcotics would without doubt be considered to be a search of the premises of reasonable scope and intensity; so should a search of persons whose clothing contains places where narcotics might be concealed.

Ybarra v Illinois, supra, should not be read as controlling the instant case. The search warrant involved in Ybarra authorized the search of the "Aurora Tap Tavern. . . . Also the person of 'Greg' the bartender. . . ." for "Heroin, contraband, other controlled substances, money, instrumentalities and narcotics paraphernalia used in the manufacture, processing and distribution of controlled substances." This Court stated that the search of Ybarra's person could not be justified by the warrant, holding that the warrant gave the officers "no authority whatever to invade the constitutional protections possessed individually by the tavern's customers." 62 L Ed 2d at 246. Ybarra is distinguishable from the case at bar in several important respects: 1) Ybarra involved a place of public accommodation, this case a private residence; 2) Ybarra was not known to have any relationship to the searched premises other than his presence, respondent was known to have keys to the dwelling and to live there; 3) in Ybarra Heroin packets were observed only behind the bar and on the person of the bartender; here, someone in the house had sold Heroin to an informant. Petitioner first contends that respondent's relationship to the premises is a sufficient (though not necessary) condition to remove this case from the holding of Ybarra.

Few cases have dealt significantly with the question here at issue. Instructive are those cases dealing with the search of personal property of a person present on the premises to be searched.

The Court in United States v Johnson, 475 F 2d 977 (CS DC, 1973) held that the search of the purse of a

visitor pursuant to a search warrant for premises was proper where the purse was not being held by the person. Thus, the court said, the search was not that of the person, and, notwithstanding defendant's status as a visitor, the purse could be searched as it could have concealed the items named in the warrant. 475 F 2d at 979. Chief Judge Bazelon, concurring and dissenting, agreed that the suppression order could not stand, but for different reasons. He disagreed that the search of the purse could be justified under the warrant, because the officers knew defendant to be a visitor on the premises. However, Judge Bazelon noted in passing that the warrant would authorize the search of a person named in the warrant as the occupant of the premises (though apparently not named as a place to be searched):

> The warrant . . . authorized the search of an apartment that was . . . occupied by John Doe alias Pete described as a negro male, 49-50 years, 165 lbs., 5' 6", medium complexion. I do not doubt that this authorized the search of 'Pete' as well as his apartment. But the warrant did not authorize a search of an individual the police knew to be a mere visitor in the apartment (emphasis added). 475 F 2d at 980.

Thus, it appears that Judge Bazelon would allow the search of a person on the premises pursuant to a search warrant for premises where the items sought could be concealed on the person and the officers executing the warrant do not have knowledge that the person has no nexus with the premises. At the very least it is fair to say that Judge Bazelon would permit searches of persons named in the warrant as having some nexus with the premises.

The holding was similar in United States v Micheli, 487 F 2d 429 (CA1, 1973). The case involved a search warrant for certain business premises, and the search of defendant's brief case which was within the

premises. The items sought were counterfeit notes. The court carefully analyzed the problem, saying that a focus on actual physical possession was at once too broad and too narrow — the approach of "immunizing from a search under sanction of a premises warrant any item within the physical possession of an individual on the premises," United States v Teller, 397 F 2d 494 (CA 7, 1968), cert den, 393 US 937 (1968), is too broad in that "a search warrant could be frustrated to the extent that there are hands inside the premises to pick up objects before the door is opened by the police;" it is too narrow in that many personal effects which may be set down should not be subject to search. The court turned to an examination of the relationship between the person and the place:

> . . . we base our decision on the fact that, as co-owner of the Hillside press (the premises), appellant was not in the position of a mere visitor or passerby who suddenly found his belongings vulnerable to a search of the premises. He had a special relation to the place, which meant that it could reasonably be expected that some of his personal belongings would be there. Thus, the showing of probable cause and necessity which was required prior to the initial intrusion into his office reasonably comprehended within its scope those personal articles, such as his brief case, which might be lying about the office. The search of his brief case, under these circumstances, was properly carried out within the scope of the warrant. 487 F 2d at 432.

The search of the person of respondent falls squarely within this rationale. Respondent was not a "mere visitor or passerby" who suddenly found his person vulnerable to a search of the premises; rather, he had a "special relation to the place," meaning that it could reasonably be expected that he might have items named in the search warrant on his person, or might

place them on his person to avoid their discovery during the execution of the warrant. The police in Ybarra had no reason to believe that Ybarra would have the items named in the warrant on his person precisely because the place was a place of public accommodation to which Ybarra had no special relationship. Respondent was not searched because "coincidentally" there existed probable cause to search the premises where he "happened to be," Ybarra, at 245, but because there was probable cause to search the premises where he was and to which he had a special relationship for items which could easily be concealed on the person. Ybarra should be read to stand for no more than the proposition that a search of persons on the premises of a place of public accommodation is beyond the scope of a warrant for the premises simply because it is not reasonable to suppose that the items named in the warrant will be on the persons of patrons, or that patrons have an interest in frustrating the warrant. Such a search is reasonable in scope where the person searched has a special relationship to the premises; indeed, had the warrant in Ybarra not specified the bartender as a place to be searched, can it be doubted that his search would nonetheless have been proper under the warrant for premises given the facts recited in the affidavit, including his relationship to the place? See Johnson, supra, at 980. Respondent's relationship to the place here removes this case from the holding and rationale of Ybarra.

C. Private Premises Versus Public Premises.

Petitioner submits that respondent's relationship to the premises searched is a sufficient, but not necessary, ground for distinguishing the instant case from Ybarra and allowing the search of respondent. The relationship is not necessary, for petitioner urges this Court to ground its decision on a different distinguishing aspect between Ybarra and the present case; namely, the fact that Ybarra involved a public

place and the instant case a private residence. Petitioner submits that a "relationship of the person to the premises" test is unsatisfactory as a necessary condition for searches of persons on private premises. The search of persons on private premises under a warrant for the premises should be permitted where the items sought could be concealed on the person because it is reasonable to believe the items might be found on such persons, and thus the search is within the scope of the warrant.

In a concurring opinion in United States v Micheli, supra, Judge Campbell rejected the "relationship of the person to the place" standard, arguing that it "grants possible sanctuary to all manner of arguably intimate personal effects carried upon the premises and then set down":

> A search of such objects is neither more nor less intrusive than would be the search of similar objects whose owner, having deposited them, had left the premises before the police arrived. Any search is an invasion of privacy; but I think the cause for issuance of the original warrant allows a search of relevant personal effects not in the possession of their owner as well as of all other relevant objects on the premises. The contraband or incriminating evidence covered by the warrant is as likely to be within brief cases or bags just brought on the premises as within other objects in the premises (footnote omitted). It is true that if the officer knows the owner of the brief case has no 'relationship' to the premises, he might have less reason to search. But in many cases the police would have no way of knowing, in advance, what is the individual's actual connection with the premises. When the stranger in the betting parlor solemnly announces that he is the family doctor, I am less sure than is the court that I would require the police to believe him — or inquire further before searching his bag. 487 F 2d at 433.

Argument

In State v Kurtz, 612 P 2d 749 (Or App, 1980) the court approved the search of a daypack under a search warrant for premises for narcotics, declining to adopt defendant's proposed test that guests with identifiable personal property should be allowed to identify and claim their property before the search. The court found persuasive the concerns voiced by the trial court:

> It just seems to me that it would not be practicable to have a rule that everything that belongs to somebody else in a house is therefore not subject to search when the Magistrate (has) authorized (a) search (of) the house. As a practical matter I don't see how we can impose an additional burden on law enforcement officers to have to take some further steps to identify what in the house belonged to the owner or what in the house belonged to the occupants as opposed to what in the house may belong to the visitors, so I am going to deny the motion to suppress.

Similarly, petitioner submits that in cases of searches of persons on the premises officers would rarely know the individual's actual connection with the premises, nor should officers be required to believe assertions of "non-relationship." Though the instant case could be justified on a relation of the person to the premises test, since defendant told the officers executing the warrant that he was the owner (see Judge Bazelon's opinion in Johnson, supra), petitioner agrees with Judge Campbell that the test is unsatisfactory. A search of reasonable scope and intensity of persons on private premises pursuant to a search warrant for those premises, where the items sought could easily be concealed on the person, should be permitted on the basis that the pockets of persons are places within the premises just as are desk drawers and closets. Both the majority and the concurrence did remark in passing that personal searches were not permitted pursuant to a search warrant for premises, Judge Campbell stating

that such as an "exception" to what he perceived to be the rule that a search warrant ". . . justifies whatever intrusion may result from searching all articles found on the premises having characteristics making it possible for them to harbor the matter described in the warrant." 487 F 2d at 433. As will be set forth more fully subsequently, petitioner submits that the supposed "exception" is ill-founded and unjustifiable where applied to private premises.

Several state courts have also had occasion to grapple with the issue. In People v Pugh, 69 Ill App 2d 312, 217 NE 2d 557 (1966), defendant was convicted of unlawful possession of narcotics as a result of a search of his person when he entered an apartment where police officers were engaged in the execution of a search warrant. The officers had fruitlessly been searching the premises for some fifteen minutes. The court held that "the execution of search warrants in narcotics cases is a risky business at best, and unless the police search all persons present on the premises they endanger both themselves and the search they are making. . . .The United States Constitution prohibits unreasonable searches. . .the search of Raymond Pugh under the circumstances of this case cannot be so classified." See People v Kielczynski, 264 NE 2d 767 (Ill App, 1970), where in upholding the search of a person pursuant to a warrant for premises for gambling instruments, implements, and apparatus, the search revealing records of horse race bets, the court said: "We conclude that the search of defendant's person, who was on the premises described in the instant search warrant, was reasonable and necessary for the execution of the warrant." 264 NE 2d at 771. See also People v Harrison, 226 NE 2d 418 (1967); People v McHale, 281 NE 2d 776 (1972).

A barber shop was the premises described in Commonwealth v Snow, 298 NE 2d 804 (Mass, 1973), and the articles named were narcotics and narcotics

paraphernalia. Defendant was not the owner of the premises, but was present when the warrant was executed. His coat was hanging on a hook, was searched, and Heroin found. The court stated that the search was not a search of the person, but went on to say that the warrant authorized the police

> to search anywhere within the four walls of the barber shop where the contraband described in their warrant might be located. They could search the various rooms, closets or storage places, including possible concealed storage places. They could look on, under, behind, or inside any piece of furniture, container or other object in the described premises, lift or remove any object to facilitate their search, and search the pockets, liners or any other parts of articles of clothing where the objects of their search might be secreted. 298 NE 2d at 812.

See also Commonwealth v Smith, 348 NE 2d 101 (1976).

State v Loudermick, 494 P 2d 1174 (Kansas, 1972) involved the search of a person on the premises. Again, narcotics were the object of the search.

> Narcotics, such as Heroin, are easily concealed on a person and may readily be disposed of. Where, as in this case, probable cause to believe that a drug is kept or concealed on certain described premises is established to the satisfaction of a proper magistrate, the search of a person found on the premises in the execution of a search warrant is not only reasonable, but necessary to secure effective enforcement of the Uniform Narcotics Drug Act. 494 P 2d at 1178.

See also State v McClelland, 523 P 2d 357 (Kansas, 1974); Martinez v State, 504 SW 2d 897 (Ct App Tex, 1974); Guerra v State, 496 SW 2d 92 (Ct App Tex, 1974);

and United States v Kralik, 611 F 2d 343, 345 (CA 10, 1979) (allowing the search of a suitcase found in an auto where the officers had a warrant to search the auto because the Fourth Amendment does not require a search warrant for each container within a larger container where the warrant covers the search of the larger container — "Theory should not be entirely divorced from practicality.")

Several cases state the proposition that a search warrant for premises does not include a right to search persons on the premises. See e.g., People v Lujan, 484 P 2d 1238 (Colo, 1971); City of Tacoma v Mondell, 495 P 2d 682 (Wash App, 1972). Most of these cases give little or no discussion to the rationale of such a rule, simply citing United States v Di Re, 332 US 581 (1947) for the proposition. But on close analysis, Di Re does not support the rule.

Di Re involved a warrantless search. An officer was informed by one Reed that Reed was to buy counterfeit gasoline ration coupons from one Battita. Battita was followed as he went to the appointed place. Officers approached the auto — Reed had coupons in his hand and said he had received them from Battita, who was sitting in the driver's seat. Di Re was a passenger, and the officers had no information whatsoever regarding him. He was arrested and searched, and counterfeit coupons found on his person. The court held that simply because there was probable cause to believe that Battita possessed coupons this gave no probable cause to search Di Re, nor to arrest him. This opinion, however, contains some unfortunate dicta. The government had conceded that a warranted search of premises would not justify a search of persons on the premises (the precise question at issue here), and the court reasoned that an unwarranted search of an auto would not justify a search of all occupants. But clearly the facts demonstrate that the officers only had reason to believe Reed and Battita possessed coupons.

Argument

To cite Di Re for the proposition that a private premises directed warrant will not allow a search of the person is thus misleading.

Although recognizing that it was unable to persuade a majority of the Court in Ybarra, petitioner submits that the logic of Justice Rehnquist's dissent is compelling in considering a search of persons on private premises. A search warrant is an anticipatory authorization to search. Just as officers cannot necessarily foresee the existence of closets, cupboards, desks, nightstands, and briefcases, neither can they necessarily foresee the existence of persons with either an interest in the items to be seized or an interest in frustrating the warrant. Where the warrant clause has been satisfied and probable cause to search private premises determined by a neutral judicial officer, a search of reasonable intensity for the sought after items is permitted. A search of reasonable intensity includes the pockets of persons on private premises where the items named in the warrant could be concealed on the person.

That a police officer armed with a search warrant for premises may conduct a search of reasonable scope and intensity of persons on the premises where the items named in the search warrant could reasonably be expected to be concealed on the person is commended by policy and logic, particularly when the existence of knock and announce requirements is considered. Before officers executing a search warrant may force entry they must request admittance, giving notice of their authority and purpose. MCL 780.656. Case law holds that after announcing their authority and purpose the officers must wait long enough for the inhabitants of the premises to reach the door from the room farthest away before forcing entry. See e.g. People v Harvey, 38 Mich 39; 195 NW 2d 773 (1972). Obviously, it would be a simple matter for a person present in the premises to pick up the item named in the warrant and put it in

his pocket (where the item is of a sort easily concealed in a pocket). Or, upon seeing the approach of officers a person present in the premises could put the item, for example a package of Heroin, in his pocket and walk out the door. Perhaps not observing the officers, one present in the premises might put the Heroin in his pocket and walk out the door on the way to a delivery. The purpose of the warrant should not be frustrated by such facile maneuvers. A search of reasonable scope and intensity of persons on private premises which are being searched pursuant to a warrant, where the items sought could easily be concealed on the person, considering the pockets of the persons to be places within the premises and thus covered by the warrant, is a reasonable search, and thus within the Fourth Amendment. The search in the instant case was within the scope of the warrant.

Argument

III.

WHERE THE JUDGES OF THE COURTS THAT HAVE CONSIDERED THE OFFICERS' CONDUCT HAVE SPLIT 7-5 OVER WHETHER THAT CONDUCT WAS PERMISSIBLE UNDER THE CONSTITUTION, IT CANNOT BE SAID THAT THE OFFICERS KNEW, OR SHOULD HAVE KNOWN, THAT THEIR CONDUCT WAS NOT PERMISSIBLE UNDER THE FOURTH AMENDMENT, SO THAT THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED.

Should this Court hold that the search of respondent cannot be justified as pursuant to the warrant, and that his search is also unsupportable as incident to arrest in that his initial detention was unconstitutional, then "consideration of official motives" comes into play in determining whether application of the exclusionary rule is appropriate. Scott v United States, supra. Petitioner submits that the officers conduct here, viewed objectively, was taken in a reasonable, good faith belief that it was proper. Application of the exclusionary rule is thus at once inappropriate, futile, and counter-productive.

Very recently the Fifth Circuit sitting en banc adopted a "good faith" exception to the exclusionary rule. United States v Williams, F 2d (CA 5, 1980). Reasoning from a number of this Court's decisions the Circuit embraced the good faith exception in the following terms:

> Henceforth in this circuit, when evidence is sought to be excluded because of police conduct

leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable good faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence.

. . . As for the exclusionary rule, insofar as we restrict its application, we do so only to conform that to its underlying purpose: to deter unreasonable or bad faith police conduct.

This holding follows logically from a number of this Court's decisions.[7]

This Court has made plain that the exclusionary rule is not a personal constitutional right of the person aggrieved, its purpose being to deter, not repair. United States v Calandra, 414 US 338, 348 (1974). Whether or not a suppression remedy should be applied after a constitutional violation has been demonstrated, Scott v United States, supra, depends on whether exclusion of the evidence would deter willful or negligent police conduct which violated some right of the accused. See United States v Janis, 428 US 433, 446 (1976): "The Court . . . has established that the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct,'" and Stone v Powell, 428 US 465, 486 (1976): "The primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights." The test is well-stated in United States v Peltier, 422 US 531, 542 (1975):

If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional

> under the Fourth Amendment. . . .we conclude that nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence here be suppressed, even if we assume that respondent's Fourth Amendment rights were violated by the search of his car.

Keeping in mind the observation in Calandra, 414 US at 348 that "Application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served," and that in Michigan v Tucker, 417 US 433, 446 (1974), that "where the official action was pursued in complete good faith. . .the deterrence rationale loses much of its force," it becomes apparent that where "the deterrence rationale of the exclusionary rule does not obtain" there is "no legitimate justification for depriving the prosecution of reliable and probative evidence." Brown v Illinois, 422 US 590 (1975). As stated by Justice White, dissenting in Stone v Powell, supra, "surely when this Court divides five to four on issues of probable cause, it is not tenable to conclude that the officer was at fault or acted unreasonably. . . ."

The exclusionary rule has also been justified by relying on the "imperative of judicial integrity." In Weeks v United States, 232 US 383 (1913) this Court held that evidence seized in violation of the Fourth Amendment was inadmissible in federal trials. But it must be noted that Weeks did not involve a factual setting where it could be argued that the officer acted in good faith. The United States Marshall simply searched Weeks' home without a search warrant or arrest warrant. He acted "without sanction of law." 232 US at 393. Similarly, in Elkins v United States, 364 US 206 (1960), in rejecting the "silver platter" doctrine, this Court stated that the federal courts should not be "accomplices in the willful disobedience of a Constitution they are sworn to uphold" (emphasis

added). 364 US at 223. But as recognized in Peltier and Stone v Powell, supra:

> . . . judicial integrity is 'not offended if law enforcement officials reasonably believe in good faith that their conduct was in accordance with the law even if decisions subsequent to the search and seizure have held the conduct of the type engaged in by the law enforcement officials is not permitted under the Constitution.' 422 US at 538; 428 US at 485, fn 2.

When a court admits evidence seized in good faith it is simply not acting as accomplice to a "willful" violation of the Constitution (if indeed there is any violation of the Constitution at all, see I and II, supra). See also Fuller v Alaska, 393 US 80 (1968); Linkletter v Walker, 381 US 618 (1965).

As further support for the proposition that the "imperative of judicial integrity" does not operate to exclude evidence seized in all cases of Fourth Amendment violations, petitioner would point out that evidence seized by private persons in violation of the Fourth Amendment is not excluded in criminal trials. Burdeau v McDowell, 256 US 465 (1921). The requirement of standing to object is another example of a situation wherein a Fourth Amendment violation does not result in suppression. Brown v United States, 411 US 223 (1973). Note should also be taken of the fact that illegally seized evidence may be used for impeachment purposes. Walder v United States, 347 US 62 (1954); Harris v New York, 401 US 222 (1971). In short, the imperative of judicial integrity is a corollary to the principle of deterrence. The integrity of the court is not offended where the court is not sanctioning and thereby encouraging "willful" violations of the Constitution. Elkins, supra.

In conclusion, petitioner would point out that this

Court has held that the decision of whether the exclusionary rule should apply to a given situation involves a balancing process:

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police conduct therefore, we must consider whether the sanction serves a valid and useful purpose. Michigan v Tucker, 417 US at 446.

> . . . when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concedly relevant and trustworthy evidence. Michigan v Tucker, 417 US at 450.

Professor Amsterdam has stated the need to limit the exclusionary rule to situations where its deterrent function is served thusly:

> As it serves this function, the rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease. Granted that so many criminals must go free as will deter constables from blundering, pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest. . . ." Amsterdam, Search, Seizure and Section 2255: A Comment, 420 Pa L Rev 378, 388-389 (1964).

To exclude the truth in a case such as this one, where there is involved no insolent use of authority, and where there is an absence of an incontestable compensating gain, is to inflict "gratuitous harm on the public interest," and is itself an affront to judicial integrity.

[1] Even where a warrant is required the concern is the privacy of the dwelling and not the warrantless seizure of the person. Payton v New York, supra.

[2] See Ariz Rev Stat Ann s. 13-1424; Colo R Crim P 41.1; Idaho Code s. 19-625; NC Gen Stats, s. 15A-271; Utah Code Ann, s. 77-13-77.

[3] State v Gryalva, 533 P 2d 533 (Ariz, 1975); Long v Garratt, 527 P 2d 1240 (Ariz, 1974); Wise v Murphy, 275 A 2d 205 (DC App, 1971); In re Fingerprinting of M.C., 309 A 2d 3 (1973).

[4] Dunaway should also not be read to disallow the practice of returning persons validly stopped under Terry to the scene of a crime for a prompt identification, a practice which has been iwdely approved. LaFave, supra, at p. 37.

[5] See e.g. United States v Peep, 490 F 2d 903 (CA 8, 1974); State v Muckleroy, 552 P 2d 257 (Or., 1976); Guzman v Estelle, 493 F 2d 532 (CA 5, 1974).

[6] People v Davenport, 39 Mich App 252; 197 NW 2d 521 (1972).

[7] See also Chief Justice Burger's dissent in Bivens v Six Unknown Federal Agents, 403 US 388 (1971), criticizing the exclusionary rule because of its undifferentiating treatment of gross and technical violations of the Fourth Amendment, and Justice Rehnquist's dissent in California v Minjares, ___ US ___, 61 L Ed 2d 892 (1979).

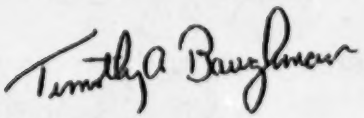
CONCLUSION

Wherefore, Petitioner concludes that this Court should reverse the Michigan Supreme Court, hold that the Heroin seized from respondent may be admitted at trial consistent with the Constitution, and remand for proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

WILLIAM L. CAHALAN
Prosecuting Attorney
County of Wayne
State of Michigan

EDWARD REILLY WILSON
Principal Attorney, Appeals



TIMOTHY A. BAUGHMAN, P24381
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5794

No. 79-1794

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MICHIGAN,

Petitioner,

-VS-

GEORGE SUMMERS,

Respondent.

ON WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

BRIEF FOR RESPONDENT

GERALD M. LORENCE
2655 Guardian Building
Detroit, Michigan 48226
(313) 961-9055
Attorney for Respondent

Washington, D.C. • CLB PUBLISHERS • LAW PRINTING CO. • (202) 393-0625

QUESTIONS PRESENTED

The Respondent will discuss the following questions:

1. DOES A SEARCH WARRANT FOR DESCRIBED PREMISES, WHICH DOES NOT IDENTIFY SPECIFIC OR DESCRIBED PERSONS WHO MAY BE FOUND THEREIN, WITHOUT MORE, AUTHORIZE OFFICERS EXECUTING THE WARRANT TO SEARCH THE PERSON OF INDIVIDUALS FOUND ON OR ABOUT THE PREMISES?
2. DO POLICE OFFICERS ACTING PURSUANT TO A PREMISES SEARCH WARRANT, WHICH DOES NOT AUTHORIZE SEARCH OR SEIZURE OF SPECIFIC OR DESCRIBED PERSONS, AND ABSENT SPECIFIC ARTICULABLE FACTS LINKING A PERSON OCCUPYING THE PREMISES TO CRIMINAL ACTIVITY, HAVE THE RIGHT TO DETAIN AN OCCUPANT FOUND LEAVING THE PREMISES AT THE TIME OF THEIR ARRIVAL?
3. WHERE THE CONDUCT OF THE OFFICERS VIOLATED THE FOURTH AMENDMENT RIGHTS OF THE DEFENDANT AND CONSTITUTED A SERIOUS DEPARTURE FROM THE FOURTH AMENDMENT WARRANT REQUIREMENTS, WAS THE APPLICATION OF THE EXCLUSIONARY RULE TO SUPPRESS EVIDENCE FOUND AS A RESULT OF THAT CONDUCT PROPER?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
INDEX OF AUTHORITIES iii
OPINIONS BELOW 1
STATEMENT OF JURISDICTION 1
CONSTITUTIONAL PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 4
ARGUMENT:

I. THE ISSUANCE OF A PREMISES SEARCH WARRANT DOES NOT, WITHOUT MORE, CONSTITUTIONALLY PERMIT A SEARCH OF PERSONS FOUND ON THE PREMISES DESCRIBED IN THE WARRANT 5

II. THE MERE EXISTENCE OF A PREMISES SEARCH WARRANT DOES NOT, WITHOUT MORE, JUSTIFY THE DETENTION OF RESPONDENT BY THE OFFICERS 12

III. THE EXCLUSIONARY RULE WAS PROPERLY APPLIED IN THE CASE AT BAR, GIVEN THE FUNDAMENTAL FOURTH AMENDMENT PRINCIPLES INVOLVED 18

CONCLUSION 22

TABLE OF AUTHORITIES

CASES:

Adams v. Williams,
407 U.S. 143 (1972) 13

Bivens v. Six Unknown Federal Narcotic Agents,
403 U.S. 388 (1971) 22

Brown v. Illinois,
422 U.S. 590 (1975) 15,21

Burdeau v. McDowell,
256 U.S. 465 (1920) 21

Commonwealth v. Smith,
348 N.W. 2d 101 (Mass. 1976) 11

Commonwealth v. Snow,
298 N.W. 2d 804 (Mass. 1973) 11

Davis v. Mississippi,
394 U.S. 721 (1969) 15,16

Delaware v. Prouse,
440 U.S. 648 (1979) 17

Dunaway v. New York,
442 U.S. 200 (1979) 5,13,15,21

Harris v. New York,
401 U.S. 222 (1971) 21

Johnson v. United States,
333 U.S. 10 (1948) 15

Katz v. United States,
389 U.S. 347 (1967) 4,7,13

Lo Ji Sales, Inc. v. New York,
442 U.S. 319 (1979) 10

Marron v. United States,
275 U.S. 192 (1927) 9

Marshall v. Barlows, Inc.,
436 U.S. 307 (1978) 10

Michigan v. Tucker,
417 U.S. 433 (1974) 19,21,22

Miranda v. Arizona,
384 U.S. 436 (1966) 19

Payton v. New York,
445 U.S. 573 (1980) 6,19,20

Pennsylvania v. Mimms,
434 U.S. 106 (1977) 16,18

People v. Bawiec,
228 Mich. 32, 199 N.W. 2d 702 (1924) 20

People v. De La Mater,
213 Mich. 167, 182 N.W. 57 (1921) 20

People v. Kramer,
223 Mich. 35, 192 N.W. 802 (1923) 20

People v. Summers,
68 Mich. App. 571, 243 NW 2d 689 (1976) 3

People v. Summers,
407 Mich. 432, 286 N.W. 2d 226 (1979) 4

Rakas v. Illinois,
439 U.S. 128 (1978) 7,13

Sibron v. New York,
392 U.S. 40 (1968) 4,5,10

Stanford v. Texas,
379 U.S. 476 (1965) 10

State v. Kurtz,
612 P.2d 749 (Or. App. 1980) 11

Terry v. Ohio,
392 U.S. 1 (1968) 5,13,14,17,18

United States v. Brignoni-Ponce,
422 U.S. 873 (1975) 16

United States v. Chadwick,
433 U.S. 1 (1977) 10

United States v. Di Re,
332 U.S. 581 (1947) 12

United States v. Johnson,
475 F.2d 977 (DC Cir. 1973).....11

United States v. Martinez-Fuerte,
428 U.S. 543 (1976).....16

United States v. Mendenhall,
____ U.S. ____ , 48 U.S.L.W. 4575 (1980).....14

United States v. Mitchell,
487 F.2d 429 (1st Cir. 1973) 11

United States v. Payner,
____ U.S. ____ , 48 U.S.L.W. 4829 (1980).....21

United States v. Ramsey,
431 U.S. 606 (1977).....16

United States v. Williams,
622 F.2d 830 (5th Cir. 1980) 18

Walder v. United States,
347 U.S. 62 (1954).....21

Ybarra v. Illinois,
444 U.S. 85 (1979)..... *passim*

Zurcher v. Stanford Daily,
436 U.S. 547 (1978)..... *passim*

CONSTITUTION

United States Constitution - Fourth Amendment ..... *passim*

MISCELLANEOUS

Amsterdam, *Perspectives on the Fourth Amendment,*
58 Minn. L. Rev. 340, 358 (1974)..... 8

IV Blackstone, *Commentaries on the Laws of England,*
(9th Ed., London, 1783)..... 6

Comment, 28 U. Chi. L. Rev., 664 (1967)..... 9

La Fave, *Search and Seizure:* The Court of True Law. . .
Has Not. . . Run Smooth, U. Ill. Law Forum 255
(1966)..... 8

R. L. Perry, *Sources Of Our Liberties,* (Rev. Ed. 1978)..... 6

T. Taylor, *Two Studies in Constitutional Interpretation*
(1969).....5-6,8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1794

MICHIGAN,

Petitioner,

-vs-

GEORGE SUMMERS,

Respondent.

ON WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 68 Mich App 571; 243 NW 2d 689 (1976). The opinion of the Michigan Supreme Court is reported at 407 Mich 432; 286 NW 2d 226 (1979). Rehearing was denied on February 29, 1980.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on April 26, 1976. The judgment of the Michigan Supreme Court was entered on December 27, 1979 (re-

hearing denied on February 29, 1980). The jurisdiction of this Court is invoked under 28 USC sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . .No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On October 10, 1974, Police Officers of the Detroit, Michigan Police Department obtained a search warrant to search premises known as 9356 Mansfield, Detroit, Michigan, said Warrant was to search for "1. Heroin, 2. Any other narcotic materials and paraphernalia" (J.A. 60).

While the Affidavit in Support of the Warrant had alleged purchase of bulk heroin from a person described as

"George" (J.A. 60) on the previous day, no person or persons were named in the Warrant.

Upon approaching the premises, the officers saw Defendant Summers exiting the premises.[1] (J.A. 6)

The officer asked Defendant if he lived there and he replied that he did. (J.A. 6). The police officer asked the Defendant if he could let them in and Defendant said he could not because he had left his keys inside, but he would rink and ask those inside to open it up. (J.A. 6). The Defendant rang the front door buzzer.

A man later identified as Dwight Calhoun opened the inner door (J.A. 7). Officer Conant identified himself and tried to open the storm door. It was locked. (J.A. 7). Dwight Calhoun slammed the inner door. (J.A. 7). Theree officers using a battering ram broke down the door (J.A. 7), and went inside. At the request of Officer Lehman, Officer Conant took Defendant into the house (J.A. 29) and remained with Defendant while the house was searched (J.A. 29). Narcotics were found in the basement (J.A. 23-24). Upon returning upstairs and finding Defendant to be the alleged owner, the Defendant was searched (J.A. 24-25), heroin was found on his person (J.A. 25) and George Summers was arrested. (J.A. 30). He was charged with possession of the heroin found on his person.

Defendant was bound over for trial following a Preliminary Examination. A Motion to Suppress Evidence and Quash the Information was granted and affirmed by the Michigan Court of Appeals, *People v. Summrs,* 68 Mich. App. 571, 243 N.W. 2d 689 (1976) and the Michigan

---

[1]There is no indication from the record that Defendant was or resembled the "George" described in the Affidavit in Support of the Warrant.

Supreme Court, *People v. Summers,* 407 Mich. 432, 286 N.W. 2d 226 (1979) and the People petitioned and obtained a Writ of Certiorari from this Honorable Court.

SUMMARY OF ARGUMENT

The warrant requirement of the Fourth Amendment is rooted not in the concept that the owner of property is suspected of crime, but that the specific things to be searched for and seized are on the property to which entry is sought. *Zurcher v. Stanford Daily,* 436 U.S. 547 (1978). The Fourth Amendment protection against unreasonable searches and seizures is a personal right, protective of legitimate expectations of privacy of persons, not places, *Ybarra v. Illinois,* 444 U.S. 85 (1979); *Katz v. United States,* 389 U.S. 347 (1967).

While a search warrant, which is a judicial rather than ministerial decision, may issue for specific or described persons upon a showing to the issuing court that probable cause exists that named or described persons may possess the things to be searched for and seized, the issuance of a premises search warrant, without more, does not provide authority to search persons found on or about the premises when the officer arrives, *Ybarra v. Illinois,* 444 U.S. 85 (1979); *Sibron v. New York,* 392 U.S. 40 (1968)

The existence of a premises search warrant does not, without more, give officers authority to detain an individual found leaving the premises by the arriving officers, for such detention violates the personal Fourth Amendment rights of the person detained; there must be specifically articulable facts, known to the officer at the time of his action, leading him to believe the person is associated with criminal activity, before detention beyond the addressing of questions may be

permitted. *Dunaway v. New York,* 442 U.S. 200 (1979); *Terry v. Ohio,* 392 U.S. 1 (1968). The mere propinquity to individuals independently suspected of crime does not give probable cause to search a person, *Sibron v. New York,* 392 U.S. 40 (1968).

In the case at bar, the officers, upon their arrival, had no specifically articulable facts linking Defendant to criminal activity, or reason to believe him armed or dangerous, justifying his detention.

The conduct of the officers was in violation of both the Defendant's Fourth Amendment rights and violative of the general principles and historical roots of the Fourth Amendment, under apparent or alleged color of a court order. This was an improper police practice, and abused the integrity of the Court who issued the premises search warrant. As such, the application of the exclusionary rule to the heroin seized from Defendant was proper.

I.

THE ISSUANCE OF A PREMISES SEARCH WARRANT DOES NOT, WITHOUT MORE, CONSTITUTIONALLY PERMIT A SEARCH OF PERSONS FOUND ON THE PREMISES DESCRIBED IN THE WARRANT.

INTRODUCTION: FOURTH AMENDMENT PARAMETERS

The most common form of search warrant issued by courts, especially in urban areas, is the premises search warrant for narcotics, *See* T. Taylor, *Two Studies in*

Constitutional Interpretation, 48 and Note 85 (1969) cited in *Zurcher v. Stanford Daily,* 436 U.S. 547, 548-49 (1978) (Dissent of Justice Stevens). It is in the execution of such warrants that citizens and law enforcement officers are most likely to come into contact in the context of warrant procedure. It is, therefore, particularly important that the parameters of the Fourth Amendment, as applied to persons and premises by this Court be set forth with some specificity before discussing the issues presented by Petitioner.

The Fourth Amendment arose as a colonial response to English practice, particularly in enforcement of trade laws, of allowing general warrants, such as writs of assistance, which allowed law enforcement officers to search any ship or home, break down doors, and seize goods at will. Such acts were in derogation of English common law, which required a detailed list of the place to be searched and the things or persons to be seized.[2] Blackstone gave the rationale for this:

> A general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its certainty; for it is the duty of the magistrate, and ought not to be left to the officer, to judge the ground of suspicion. And a warrant to apprehend all persons, guilty of a crime therein specified, is no legal warrant: for the point, upon which its authority rests, is a fact to be decided on a subsequent trial; namely, whether the person apprehended thereupon be really guilty or not.

It is from this background of our history that the Fourth Amendment is derived.[3] The Amendment provides:

---

[2]R.L. Perry (ED), *Sources of Our Liberties,* 304 (Rev. Ed. 1978)

[3]*Commentaries on the Laws of England,* (9th Ed London 1783), IV 291 quoted in Perry, note 1 *supra* at 304; *See also Payton v. New York* 445 U.S. 573 (1980) (Dissent of Justice Blockman.)

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The Fourth Amendment has been held by this Court to be protective of the "legislative expectations of privacy" of persons, not places.[4] *Ybarra v. Illinois,* 444 U.S. 85, 91 (1979); *Rakas v. Illinois,* 439 U.S. 128 (1978); *Katz v. United States,* 389 U.S. 347, 351-352 (1967). This is a personal right of the individual.

The warrant provision relates, not to persons, but to property; a warrant may be obtained for a search of specified property without a showing that the owner thereof is necessarily suspected of criminal activity; *Zurcher v. Stanford Daily,* 436 U.S. 547, 556-559 (1978). The probable cause for a warrant to issue is not the probable cause for an arrest, *Zurcher, supra* at 556-557, n.6. There, this Court, speaking through Justice White noted:

> *The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is sought.* The same view has been expressed by those who have given close attention to the Fourth Amendment. "It does not follow, however, that probable cause for arrest would justify the issuance of a search warrant, or, on the other hand, that probable cause for a search warrant would necessarily justify an arrest. Each requires probabilities

---

[4]*Perry, supra,* noted at 304-305, 427.

as to somewhat different facts and circumstances, a point which is seldom made explicit in the appellate cases. . .

"This means, for one thing, that while probable cause for arrest requires information justifying a reasonable belief that a crime has been committed and that a particular person committed it, a search warrant may be issued on a complaint which does not identify any particular person as the likely offender. Because the complaint for a search warrant is not 'filed as the basis of a criminal prosecution', it need not identify the person in charge of the premises or name the person in possession of any other person as the offender." LaFave, *Search and Seizure:* "The Court of True Law. . .Has Not. . .Run Smooth", U. Ill. Law Forum 255, 260-261 (1966) (footnotes omitted). "Furthermore, a warrant may issue to search the premises of anyone without any showing that the occupant is guilty of any offense whatever." T. Taylor, *Two Studies in Constitutional Interpretation* 48-49 (1969). "Search warrants may be issued only by a neutral and detached judicial officer, upon a showing of probable cause - that is, reasonable grounds to believe - that criminally related objects are in the place which the warrant authorizes to be searched, at the time when the search is authorized to be conducted." Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 340, 358 (1974) (footnotes omitted).

"Two conclusions necessary to the issuance of the warrant must be supported by substantial evidence; that the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched. By comparison, the right of arrest arises only when a crime is committed or attempted in the presence of the arresting officer or when the officer has 'reasonable grounds to believe' - sometimes stated 'probable cause to believe' - that a felony has been committed by the person to be arrested.

> Although it would appear that the conclusions which justify either arrest or the issuance of a search warrant mut be supported by evidence of the same degree of probity, it is clear that the conclusions themselves are not identical.
>
> "In the case of arrest, the conclusion concerns the guilt of the arrestee, whereas in the case of search warrants, the conclusions go to the connection of the items sought with crime and to their present location." *Comment,* 28 U. Chi. L. Rev. 664, (1961) (footnotes omitted) (emphasis added).

The specificity requirement is that the warrant described with particularity the individuals or places to be searched and the individuals or things to be seized and is stressed in *Zurcher v. Stanford Daily,* 436 U.S. at 558-559, 564-565 (1978). This Court has held that the specificity required is to, at best, leave nothing to the discretion of the officer with regard to what is to be seized. *Marron v. United States,* 275 U.S. 192 (1927).

With these parameters set forth, one can examine the decisions of this court regarding the interaction of a search warrant for premises and the search of an individual not named therein.

THE INDIVIDUAL IN THE SEARCH WARRANT CONTEXT

This court has succinctly set forth the relationship of an individual to premises that are named in a lawfully obtained search warrant that does not name or describe that person. In *Ybarra v. Illinois,* 444 U.S. 85, 91-92 (1979) this court speaking through Justice Stewart, held:

> Each patron who walked in the Aurora Tap Tavern on March 1, 1976, was clothed with constitutional pro-

tection against an unreasonable search or an unreasonable seizure. That individualized protection was separate and distinct from the Fourth and Fourteenth Amendment protection possessed by the proprietor of the tavern or by "Greg". Although the search warrant, issued upon probable cause, gave the officers authority to search the premises and to search "Greg", it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers.*

---

*The Fourth Amendment directs that "no Warrants shall issue, but upon probable cause... and particularly describing the place to be searched, and the persons or things to be seized." Thus, "open-ended" or "general" warrants are constitutionally prohibited. *See Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319 (1979); *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 311 (1978); *United States v. Chadwick,* 433 U.S. 1, 7-8 (1977); *Stanford v. Texas,* 379 U.S. 476, 480-482 (1965). It follows that a warrant to search a place cannot normally be construed to authorize a search of each individual in that place. The warrant for the Aurora Tap Tavern provided no basis for departing from this general rule. Consequently, we need not consider situations where the warrant itself authorizes the search of unnamed persons in a place and is supported by probable cause to believe that persons who will be in the place at the time of the search will be in possession of illegal drugs.

The *Ybarra* case, like the case at bar, involved a premises search for narcotics. The *Ybarra* court noted that mere propinquity to others independently suspected of criminal activity does not give rise to probable cause to search that person. *Ybarra v. Illinois,* 444 U.S. 85, 91 (1979), *citing Sibron v. New York,* 392 U.S. 40, 62-63 (1968).

Many of the cases cited by the petitioner are not in-

consistent with the analysis required by *Zurcher, supra,* and *Ybarra, supra.* Where the search is of personal property of one not an owner, found on the described premises,[5] the search is permissible under *Zurcher, supra.* The search is not moving to invade the personal right of anyone.

Nor is a search of a person named or described in a warrant a conflict with these principles; for such warrants can issue upon a showing of probable cause that the things sought will be found on his person.[6]

The petitioner would assert, in effect, that a person on premises subject to a warrant is, in the narcotics context at least, a "container" where the contraband may be hidden. This argument misses the distinction between *Zurcher* and *Ybarra,* between things and persons, between individual rights, which are to be jealously guarded, and the warrant requirement, with its standard of probable cause. To adopt the position asserted by petitioner is to permit, contrary to *Sibron, supra,* a search based upon mere propinquity, of the person, and in effect makes the premises search warrant in a narcotics case a general warrant, contrary to the historical basis of the Fourth Amendment. This position, asserted by petition (Brief at 22) to distinguish the case at bar from *Ybarra* cannot hold.

The other distinction made by petitioner between the instant case and *Ybarra v. Illinois,* 444 U.S. 85 (1979) is

---

[5]Of the cases cited by petitioner, these include *United States v. Johnson,* 475 F.2d 977 (DC Cir. 1973); *United States v. Mitchell,* 487 F.2d 429 (1st Cir. 1973); *State v. Kurtz,* 612 P.2d 749 (Or. App. 1980; *Commonwealth v. Snow,* 298 N.W. 2d 804 (Mass. 1973); *Commonwealth v. Smith,* 348 N.E. 2d 101 (Mass. 1976).

[6]It should be noted that the investigating officers had a description of the person who sold the narcotics to the informant, but there is no indication they even tried to get a warrant to search this person.

that *Ybarra* involved a public place, a bar, and the instant case involved a residence. Again, this argument misses the distinction, made clear in *Ybarra, supra,* and *Zurcher, supra,* between individual rights and the warrant requirement, dealing with things and places.

If the investigators have probable cause to believe that persons occupying described premises are, individually or in concert, likely to have on their person contraband allegedly to be found on the premises, a warrant can issue for the search of that person, as well as the premises, without violation of individual rights or the warrant requirement, to make any person on the premises a potential "container" is to do both; it intrudes upon the individual without a nexus being established between the person and the suspected contraband other than mere presence, *United States v. Di Re,* favorably cited, 332 U.S. 581, 583-587 (1947); *Ybarra v. Illinois,* 444 U.S. 85, 94-95 (1979), and destroys the concept of limited intrusion, as opposed to general warrants, that is at the heart of the Fourth Amendment warrant requirement.

II.

THE MERE EXISTENCE OF A PREMISES SEARCH WARRANT DOES NOT, WITHOUT MORE, JUSTIFY THE DETENTION OF RESPONDENT BY THE OFFICERS.

Police officers appeared at a home where Defendant lived with a premises search warrant authorizing a search of the premises, but not of any named or described person. They encountered defendant walking away from the home. He said he lived there, but did not have his key with him. He

knocked, and a man answered the door; then slammed it. The officers detained defendant, forcibly brought the defendant into the premises, searched the house, found alleged contraband, arrested defendant, then searched his person, and found narcotics, for the possession of which he was charged.

Defendant submits that his detention and the seizure of the heroin from his person were in violation of his Fourth Amendment protection from unreasonable search and seizure.

Like the issue preceding, defendant respondent submits there are several settled constitutional principles which must be set forth before analysis of the position taken by the petitioner.

The Fourth Amendment applies to legitimate "expectations of privacy" of persons, not places. *Ybarra v. Illinois,* 444 U.S. 85, (1979); *Rakas v. Illinois,* 439 U.S. 128, 138-143 (1978); *Katz v. United States,* 389 U.S. 347, 351-352 (1967).

The warrant requirement deals with things and places, and is governed by a probable cause requirement not necessarily linked to the probable cause to arrest a person, *Zurcher v. Stanford Daily,* 436 U.S. 547, 557-559 (1978).

A police officer, acting upon reliable information, may make a reasonable investigatory stop, without having probable cause to arrest, to investigate possible criminal behavior, *Adams v. Williams,* 407 U.S. 143, 145-147 (1972); *Terry v. Ohio,* 392 U.S. 1 (1968). If the officer is justified in believing himself in danger, he may conduct a pat down search for weapons. *Id.* This is a narrow exception to the probable cause requirement and is to be construed narrowly, *Ybarra v. Illinois,* 444 U.S. 85 (1979), *Dunaway v. New York,* 442 U.S. 200 (1979).

While *Terry, supra,* specifically did not deal with an investigative seizure for "detention", the *Dunaway* majority

noted the following from Justice White's *Terry* opinion:

> 12. Terry specifically declined to address "the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation". *Id.*, at 19 n. 16. Mr. Justice White, in a concurring opinion, made these observations on the matter of interrogation during an investigative stop:
>
> "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." *Id.*, at 34.

442 U.S. at 210, n. 12.

In the case at bar, it is submitted that Defendant Summers was "detained" by the officers from the time they learned he was an occupant of the premises. Summers was never advised that he was free to go and was in fact brought into the premises and held in the company of the officers while the premises, suspected of containing contraband, and which had been forced open, was searched, and contraband was found. The situation presented was one where a reasonable individual, given the circumstances and the show of police authority, would have believed he was not free to leave, and, accordingly, defendant was "seized". *United States v. Mendenhall,* ____ U.S. ____ 48 U.S.L.W. 4575 (May, 1980), (opinion of Justice Stewart). This was no different than a traditional arrest and appears as an act seeking to

justify the arrest by the fruits of the search. The answer given prior to search may justify further observation of defendant, but not arrest and detention.

The Fourth Amendment protection is a strong one, designed by the founders to be rigidly applied, and any deviation therefrom must be narrowly construed. In *Dunaway v. New York,* 442 U.S. 200 (1979), this court held:

> In effect, respondent urges us to adopt a multifactor balancing test of "reasonable police conduct under the circumstances" to cover all seizures that do not amount to technical arrests. But the protections intended by the Framers could all too easily disappear in the consideratio and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the "often competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10, 14 (1948). A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront. Indeed, our recognition of these dangers, and our consequent reluctance to depart from the proved protections afforded by the general rule, are reflected in the narrow limitations emphasized in the cases employing the balancing test. For all but those narrowly defined intrusions, the requisite "balancing" has been performed in centuries of precedent and is embodied in the principle that seizures are "reasonable" only if supported by probable cause.

This court also reiterated its position taken in *Davis v. Mississippi,* 394 U.S. 721 (1969) and *Brown v. Illinois,* 422 U.S. 590 (1975) that Fourth Amendment rights apply at the "investigative stage"; that it is not the form of the police conduct or its label, but the impact upon the citizen,

that triggers the application of the amendment. In the case at bar, the impact of the police conduct upon defendant was no different than a traditional arrest. That it is at an "investigatory" level - at a warrant search for things in a described place - does not change the impact. The *Davis* court held:

> [T]o argue that the Fourth Amendment does not apply to the investigatory state is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizentry, whether these intrusions be termed 'arrest' or 'investigatory detentions'. 394 U.S. at 726-727.

It is into this context that one must analyze the cases and arguments of the petitioner.

The "border search" cases cited by petitioner are most readily distinguishable, *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975); *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976). The border area traditionally permits a less restrained search practice for illegal activity related to the border and the Fourth Amendment proportion is reached only when search practices are highly intrusive, *United States v. Ramsey,* 431 U.S. 606, 616-619 (1977).

Pennsylvania v. Mimms, 434 U.S. 106 (1977), involved a lawful traffic stop, where the officer had a right, by his observation of defendant's operation of the car, to detain him. Under these circumstances the further intrusion of ordering defendant from the car was "incremental". 434 U.S. at 109 and de minimus 434 U.S. at 121. This intrusion is the sole basis of the decision, and is a far cry from the case at bar.

Delaware v. Prouse, 440 U.S. 648 (1979) found unconstitutional a law enforcement practice allowing random stops of vehicles to check license registration and held that there must at least be an articulable and reasonable basis that either the vehicle is not registered or the driver is unlicensed to justify such stops. Stopping all cars, at a checkpoint, would, for example, be allowed, but if discretion is to be allowed the officers, it must be based on an individualized set of facts. 440 U.S. at 663.

At the time of the intrusion and detention of defendant in the case at bar, the officers had no such articulable facts. They had a warrant for premises, to search for contraband, but did not articulate, so as to be included in the warrant, probable cause that any named or described person, had the contraband. There is no evidence from the fact of the issuance of the warrant to suggest guilt of a described or named person, *Zurcher v. Stanford Daily,* 436 U.S. 547 (1978). The questioning by the officers of Summers, allowable under *Terry v. Ohio,* 392 U.S. 1 (1968) prior to the appearance of the man inside, did not create probable cause to arrest, and there was no pat down search or articulable facts to permit one. When the man inside came to the door, there was no showing of concerted action between him and Summers to individualize probable cause to defendant to justify his detention or a search of his person. The forcing of the door, done *after* the detention revealed contraband in the basement. It was only *after,* and as a result of, the detention that any articulable facts could be said to have surfaced to link defendant to anything found on the premises and it was only as a result of this alleged linkage that intrusion into his person could be justified.

At the time of detention there were no articulable facts known to the officers to link defendant to any contraband

they might find in the premises. The detention of defendant was, by its conduct, in the nature of a traditional arrest, and notthe slight intrusion of *Terry v. Ohio,* 392 U.S. 1 (1969), or *Pennsylvania v. Mimms,* 434 U.S. 106 (1977) or the traditionally unique border cases.

There was a violation of the Fourth Amendment right of defendant by the actions of the officers, correctly found by the Michigan courts.

III.

THE EXCLUSIONARY RULE WAS PROPERLY APPLIED IN THE CASE AT BAR, GIVEN THE FUNDAMENTAL FOURTH AMENDMENT PRINCIPLES INVOLVED

The petitioner and the Solicitor General of the United States, as Amicus Curiae, argue that the exclusionary rule should not apply to preclude use of the evidence seized from Defendant-Respondent's person, if, as Defendant-Respondent submits and the Michigan Supreme Court found, the seizure violated the Fourth Amendment. Heavy reliance is placed upon *United States v. Williams,* 622 F.2d 830, 840-849 (5th Cir. 1980), petition for certiorari filed September 2, 1980, where the Fifth Circuit, *en banc,* held that henceforth, the exclusionary rule would not be applied where the evidence is discovered by officers acting in good faith and in the reasonable, though mistaken belief, that their conduct is authorized.

Respondent would submit that this reliance is misplaced; the majority opinion in *Williams* specifically limits itself to *warrantless* actions and specifically excludes comment on factual situations where a warrant has been obtained,

Williams, supra at 840. As will be shown herein, there are valid reasons for this distinction, given the Fourth Amendment principles involved.

Likewise Petitioner and the Solicitor General rely upon *Michigan v. Tucker,* 417 U.S. 433 (1974), where this court refused to exclude evidence obtained prior to, and in a manner inconsistent with, the decision of this Court in *Miranda v. Arizona,* 384 U.S. 436 (1966), clarifying the constitutional protection against self-incrimination. *Tucker* relied upon a comparative analysis of the historical premises upon which the Fifth Amendment was based and the conduct involved, and a conclusion that privilege against self-incrimination had not been violated, only that the Defendant did not receive the full procedural safeguards required to protect the right. 417 U.S. at 443-446. Respondent submits that the Fourth Amendment rights involved in the case at bar differ significantly from that presented in *Tucker* and the historical tradition from which they arise call for application of the exclusionary rule.

In *Payton v. New York,* 445 U.S. 573 (1980), this court held that the Fourth Amendment required a warrant be obtained to facilitate an arrest in the home. This was notwithstanding the fact that a majority of states permitted such warrantless entry. The Court noted that, in the past decade, the number of such states permitting such conduct was on the decline. *Payton, supra,* at 659, and that those states dealing with the question had, for the most part, either found such activity unconstitutional or, at least, that serious constitutional questions were presented. The Court found that an arrest warrant naming a person impliedly carries with it limited authority to enter a dwelling where he lives or there is reason to believe he was within and absent such a warrant the convictions were set aside.

It is submitted that, while Michigan or the Sixth Circuit had not dealt with the specific issue herein presented, the trend in this analogous area should have been known and considered by the courts issuing warrants in Michigan.

It has been recognized in Michigan that the issuance of a warrant is not a ministerial act on the part of the magistrate, but involves the exercise of judicial discretion and the magistrate must satisfy himself that reasonable or probable cause exists for the requested warrant before signing it. *People v. Kramer,* 225 Mich. 35, 195 N.W. 802 (1923); *People v. De La Mater,* 213 Mich. 167, 182 N.W. 57 (1921). The description of the scope of the warrant was, in Michigan, viewed as a limited one. *See*, i.e., *People v. Bawiec,* 228 Mich. 32, 199 N.W. 702 (1924).

The roots of the Fourth Amendment, while less clear to the majority in *Payton, supra,* as perhaps the rules on arrest in public places, were found by the majority to be based on the common law requirement of a warrant or substantial exigent circumstances to arrest a suspect at home. 445 U.S. 573 (1980) (Dissent of Justice Blackmun). It was abuse of the warrant process by the Crown that was the impetus for the Fourth Amendment. *Id.*

These cases demonstrate the need for the distinction made in *Williams, supra.* In a situation involving a warrant, the police officers of necessity are seeking a prior approval of their proposed conduct by the judiciary, which must apply its discretion and apply the appropriate constitutional guidelines to the proposed conduct. The warrant in effect is a determination of the authority of the officers given them by the information in their possession. Officers acting without a warrant do not have the benefit of, or the actual knowledge of, those constraints (hopefully) conveyed to them by the judiciary. In executing a warrant, the officers carry with

them the integrity of that judicial discretion. If it is abused, it is the court, as well as the public, who suffers. Unlike *Tucker,* where the failure was not to protect a fundamental right, but a failure of the officers to provide full procedural safeguards, subsequently articulated by this court, the case at bar presents a situation involving the scope of the Fourth Amendment, as applied to an individual and to premises, and seeks an interpretation in serious conflict with the historical basis and roots of the Amendment. It is a direct consequence of actions of officers executing a court order, seeking direct evidence of crime.

This distinguishes several cases cited by Petitioner where the conduct is either not done by government agents, *Burdeau v. McDowell,* 256 U.S. 465 (1920) or not sought to be used to obtain direct evidence of crime against the accused, *Harris v. New York,* 401 U.S. 222 (1971); *Walder v. United States,* 347 U.S. 62 (1954). *See also United States v. Payner,* ____ U.S. ____ , 48 U.S.L.W. 4829 (1980), (accused lacks standing to seek exclusion of evidence obtained in violation of another's constitutional rights). The case at bar is clear; the accused is asserting claim of personal Fourth Amendment rights and challenging the scope of a warrant directed to premises occupied by him under the Fourth Amendment.

It is also with some interest to note that the Petitioner seeks a limitation of the exclusionary rule for the case at bar based largely upon the narrow authority of *Michigan v. Tucker,* 417 U.S. 433 (1974) and the United States, as *Amicus Curiae,* on the ground that the conduct occurred before the decisions in *Dunaway v. New York,* 442 U.S. 200 (1979) and *Brown v. Illinois,* 422 U.S. 590 (1975). Respondent has demonstrated that the historical context of the Fourth Amendment and the nature of the conduct involved, a form of analysis approved by this court in

Michigan v. Tucker, 417 U.S. 433 (1974) prior the conduct complained of, justifies the conclusion made by the Michigan court.

It should also be pointed out that, at the time of the conduct complained of, courts and law enforcement agencies were aware of the strong criticism, and strong warning, of Justice Burger, dissenting in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971), that the exclusionary rule may be a poor tool to deter law enforcement officers from using unlawful means to obtain evidence, and that means, other than the judicial, are needed to provide a better form of deterrence. Rejection of the rule is not a license to expand permissible conduct, it is seen as a change in analysis, and remedy, possibly beyond the power of the Court. This analysis is particularly true in the warrant context, with police acting upon instruction sought and approved by the issuing court.

Absent this alternative analysis, which Petitioner does not present, and for the reasons stated herein, Respondent submits that the application of the exclusionary rule was proper in the case herein.

CONCLUSION

WHEREFORE, Respondent George Summers concludes that this court should affirm the decision of the Michigan Supreme Court.

Respectfully submitted,

/s/ GERALD M. LORENCE
Attorney for Respondent

No. 79-1794

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

—v.—

GEORGE SUMMERS,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF MICHIGAN

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

MARY L. HEEN
BRUCE J. ENNIS, JR.,
Counsel of Record
CHARLES S. SIMS
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

LAWRENCE HERMAN
Ohio State University
College of Law
1659 N. High Street
Columbus, Ohio 43210

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES i

INTEREST OF AMICUS CURIAE. 1

STATEMENT OF THE CASE. 2

SUMMARY OF ARGUMENT. 11

ARGUMENT 14

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED. . . .14

A. Defendant's Arrest And The Search of His Person Incident to That Arrest Were Not Authorized Under State Law. 20

B. Under State Law, The Warrant to Search The Premises Did Not of Itself Authorize A Search of Defendant's Person 26

II. IF THE COURT DECIDES THE CASE IS PROPERLY BEFORE IT, THE IN-HOUSE DETENTION OF RESPONDENT DURING THE EXECUTION OF THE SEARCH WARRANT SHOULD BE HELD AN UNREASONABLE SEIZURE UNDER THE FOURTH AMENDMENT 30

Pages

A. In The Circumstances Of This Case, The Categorical Exception Urged By The State Would Not Advance Any Important Government Interest 37

B. The Intrusion On The Individual That Would Be Authorized By The Categorical Exception Urged By The State Would Be Much More Severe Than The De Minimis Intrusion Authorized In Terry And Mimms 44

III. THE COURT SHOULD NOT APPLY A "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE IN THIS CASE. 48

A. This Is Not An Appropriate Case In Which To Consider Adoption Of A "Good Faith" Exception To The Exclusionary Rule 48

B. The Evidence Seized As An Indirect Result Of The Unconstitutional Detention Should Be Excluded Even If The Officers Acted In Good Faith, At That Time. .52

CONCLUSION. 61

TABLE OF AUTHORITIES

Cases	Pages
Adams v. Williams, 407 U.S. 143 (1972)	33
Brinegar v. United States, 338 U.S. 160 (1949)	31
Brown v. Texas, 443 U.S. 47 (1979)	30,32,36
Davis v. Mississippi, 394 U.S. 721 (1969)	30
Dunaway v. New York, 442 U.S. 200 (1979)	passim
Elkins v. United States, 364 U.S. 206 (1960)	54,59
Harris v. United States, 331 U.S. 145 (1947)	45
Henry v. United States, 361 U.S. 98 (1959)	30
Herb v. Pitcairn, 324 U.S. 117 (1945)	18
In re Search Warrant, Misc. No. 77-0151 (D.D.C., Aug. 24, 1979)	45
Mapp v. Ohio, 367 U.S. 643 (1961)	54,59
Mental Hygiene Department of California v. Kirchner, 380 U.S. 194 (1965)	19

Cases	Pages
Michigan v. DeFillippo, 443 U.S. 31 (1979)	58
Michigan v. Tucker, 417 U.S. 433 (1974)	57
Minnesota v. National Tea Company, 309 U.S. 551 (1940)	20
Pennsylvania v. Mimms, 434 U.S. 106 (1977)	32,33
People v. Davenport, 39 Mich. App. 252, 197 N.W. 2d 521 (1972)	passim
Sibron v. New York, 392 U.S. 40 (1968)	33,58
State of California v. Krivda, 409 U.S. 33 (1972)	19
Stone v. Powell, 428 U.S. 465 (1976)	57
Terry v. Ohio, 392 U.S. 1 (1968)	passim
Torres v. Commonwealth of Puerto Rico, 442 U.S. 465 (1979)	55,57
United States v. Brignoni-Ponce, 422 U.S. 873 (1975)	34
United States v. Calandra, 414 U.S. 338 (1974)	54,57

Cases — Pages

United States v. Janis,
428 U.S. 433 (1976)..... 57

United States v. Martinez-
Fuerte, 428 U.S. 543 (1976)..... 34

United States v. Peltier,
422 U.S. 531 (1975)..... 57

Ybarra v. State of Illinois,
444 U.S. 85 (1979)..... 28,47

Statutes

Mich. Comp. L. Ann. 335.341(4)(a)
(West 1975)..... 6,22

Other Authorities

United States Constitution
Fourth Amendment..... passim

Amsterdam, "Perspectives on the
Fourth Amendment," 58 Minn.
L.Rev. 349 (1974)..... 54,55

Schrock and Welsh, "Up From
Calandra: The Exclusionary
Rule as a Constitutional
Requirement," 59 Minn.
L.Rev. 251 (1974)..... 59

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union is a nationwide, non-partisan organization of over 200,000 members, dedicated solely to defending the principles of freedom embodied in the Bill of Rights.

Central to those freedoms is the right to be free from unreasonable government searches and seizures protected by the Fourth Amendment of the United States Constitution. That Amendment erects a critical barrier between the government and the citizen, and it defines the standards the government must follow whenever it seeks to invade "the right of the people to be secure in their persons."

The ACLU has participated in numerous cases, including Dunaway v. New York, 442 U.S. 200 (1979), in which we have urged the Court to adopt a "strict construction" of the Fourth Amendment. The purpose of this

amicus brief, however, is to argue that the Court should not reach the Fourth Amendment issues raised by Petitioner, but should instead dismiss the writ of certiorari as improvidently granted.

Counsel for both Petitioner and Respondent have consented to the filing of this brief. Copies of the letters of consent are being filed with the Clerk.

STATEMENT OF THE CASE

1. Seven Detroit police officers arrived shortly after 10:00PM on October 10, 1974, to execute a warrant to search a two-story private house. The warrant authorized the officers to search the premises and seize heroin and any other narcotics and paraphenalia found, but did not by its terms authorize the search of persons found on the premises. The owner of the house was not named in the search

warrant. [1] The affidavit in support of the search warrant, however, stated that an informant had purchased heroin at that house the day before.

As the officers arrived at the house, Officer Lehman saw a man (later identified as defendant Summers) leave the front door of the house and walk down the front porch steps. After identifying themselves as police, and ascertaining that the man lived in the house he had just left, the police told him to open the door of the house. Defendant Summers was not at that time asked

---

[1] Although the Michigan Supreme Court Opinion correctly states that the owner of the house was not named in the search warrant, the Michigan Court of Appeals states the contrary, noting, however, that a copy of the search warrant did not appear in the record. It is not clear from the papers submitted by the parties when the search warrant and affidavit, found at pp. 60-61 of the Joint Appendix (hereinafter JA) became part of the record, or whether they are part of the record at all.

his name, nor was he frisked for weapons. Summers replied that he was unable to open the door because he had left his keys inside, but he could ring someone over the intercom.

Summers then went to the porch, pushed the buzzer and spoke to someone inside named "Dwight". Dwight Calhoun opened the main door, but when the police identified themselves, and attempted to open the locked storm door, he slammed shut the inner door. Some of the police officers then knocked down the front doors and entered the house.

Officer Lehman instructed Officer Conant, previously stationed along the side of the house, to bring Summers, still on the porch, into the house. Officer Conant kept Summers in the living room while the house was secured. Meanwhile, Officer Lehman pursued Calhoun into a downstairs bedroom and placed him under arrest after seeing him toss

a pack containing suspected heroin on the bed, and brought him upstairs to the living room. Other persons were found in the house and brought to the living room by other police officers. A total of eight persons, including Calhoun and Summers, were detained by the police while the search was conducted. 2/

After finding suspected narcotics concealed under a bar in the basement and determining from questioning Summers that he was the owner of the house, Officer Conant formally arrested Summers for violation of the Controlled Substances Act of 1971. A search of Summers incident to that arrest revealed a packet of suspected heroin in his jacket pocket. The possession of the heroin found in his jacket formed the basis

---

2/ The duration of the search cannot be determined from the record.

of the charge ultimately brought against him. [3] He was never prosecuted for possession of the narcotics found in the basement.

2. Following a preliminary examination, Summers was bound over for trial. The trial court granted his motion to suppress the evidence seized from his person and quashed the information. At the hearing on the motion to suppress, the prosecutor conceded that the state did not have probable cause to arrest Summers when he was outside the house, JA 53-54, but argued that the detention outside the house was a valid investigatory stop by officers armed with a premises search warrant, and that there was probable cause to arrest

---

[3] Mich. Comp. L. Ann. 335.341(4)(a)(West 1975), repealed in 1978, Mich. Pub. Acts of 1978, No. 368 §25101, and recodified as Mich. Comp. L. 333.7403(1)(West Supp. 1980).

Summers after the heroin was found in the basement and it was ascertained that he was the owner of the house. JA 53, 56. The trial court found that Summers had been brought back into the house involuntarily. In addition, the court concluded that under state law, People v. Davenport, 39 Mich. App. 252, 197 N.W. 2d 521 (1972), the police lacked probable cause to arrest Summers in connection with the drugs found in the basement. Therefore, the heroin found in his pocket was the fruit of an illegal arrest. JA 58.

3. The Michigan Court of Appeals affirmed. It rejected on state law grounds the prosecutor's argument, made for the first time on appeal, that the search of Summers' person was authorized by the warrant to search the premises, on the theory that defendant's clothing was a "place where"narcotics could be located. The court also rejected on state law grounds the argument that the

search was justified because of Summers' ownership of the house, his presence "on the premises", and the "reasonable expectation" that heroin would be found on his person. The court, noting that Summers had been stopped outside the house and therefore was not "present upon the premises" to be searched when the officers arrived, determined that this case did not present the proper occasion to decide the open question under state law of "the extent to which persons found on the premises as a search warrant is executed can be searched without another warrant." However, the court did conclude under state law that a search warrant does not authorize the search of someone found "outside" the premises to be searched. Appendix to Petition for Writ of Certiorari ("A"), at A 5-6. The Court declined to decide whether taking Summers back into the house constituted an unlawful deten-

tion under state or federal law. A 6-7. The court agreed with the trial court that the police, under People v. Davenport, supra, lacked probable cause to arrest Summers after the drugs were found in the basement because there were no factors, independent of his ownership of the house, linking Summers to the drugs found. A 11-12. The court concluded that the heroin seized from his person was inadmissible as the fruit of that unauthorized arrest.

4. The Michigan Supreme Court affirmed on a different ground. Instead of reaching the question of the validity of the arrest or of the search under state law, it held that detaining Summers while the search warrant was being executed, before he was arrested or searched, violated the Fourth Amendment. Applying Dunaway v. New York, 442 U.S. 200, (1979) and Terry v. Ohio, 392 U.S. 1 (1968), and its progeny,

the court determined that the in-house detention of Summers would have been reasonable only if supported by probable cause to arrest:

> To sanction a further detaining of defendant without probable cause would in effect replace the fundamental and essential probable cause standard with a multi-factor balancing test specifically rejected by the United States Supreme Court in Dunaway. A 22.

Because, in the court's view, the police did not then have probable cause to believe Summers had committed a crime, the heroin seized from his person had to be excluded as the fruit of an unlawful "arrest", (i.e., the detention).

This Court granted certiorari on October 14, 1980.

SUMMARY OF ARGUMENT

The writ of certiorari should be dismissed as improvidently granted because it is not necessary, in the circumstances of this case, for the Court to resolve any federal constitutional issues. Even if the Court were to conclude that the in-house detention of respondent did not violate the Fourth Amendment, the illegality of his subsequent arrest and search, as determined by the courts below on state law grounds, would require the same judgment. To avoid rendering an advisory opinion, the Court should decline to resolve the federal constitutional issues raised by Petitioner. Point I.

If the Court reaches the in-house detention issue, the detention should be held an unreasonable seizure of respondent's person under the Fourth Amendment. The categorical exception to the probable cause

requirement urged by the state for detention of persons "on or departing from" the premises during execution of a search warrant "until the search is completed," should be rejected as unconstitutional under the test adopted by the court in Terry v. Ohio, 392 U.S. 1 (1968), because the exception would not advance any important governmental objectives, and would be very intrusive. Point II.

Finally, this is not an appropriate case in which to consider adoption of a "good faith" exception to the exclusionary rule. The trial court suppressed the evidence under state law as the direct fruit of an illegal arrest. Even if the police acted in "good faith" at the time of the detention, their "good faith" would not justify an exception to the

exclusionary rule if they acted in "bad faith" when they later arrested and searched respondent Summers. Point III A. Furthermore, a "good faith" exception to the exclusionary rule should not be applied here where their good faith could not be justified by reliance on established statutory or constitutional authority. Point III B.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

The Michigan Supreme Court held that the detention of defendant Summers "prior to execution of the premises search warrant" constituted an "arrest" without probable cause in violation of the Fourth Amendment. A 16, A 18, and A 22-23. The state does not contend that there was probable cause for an arrest during the initial period of detention prior to the finding of narcotics in the searched premises. [4/] Rather, the state contends only that the initial deten-

---

[4/] The state does contend that the subsequent finding of narcotics on the premises, coupled with Summers' acknowledgement that he was the owner of the premises, did establish probable cause to arrest him. The Michigan Supreme Court did not address this contention, and it is irrelevant to our argument here.

tion was so much briefer and less intrusive than a typical arrest that it should not be considered an "arrest", but only a stop, and that such stops do not have to be based on probable cause, so long as they are reasonable. (Pet. Br. 10).

Whether the initial detention at issue in this case was an "arrest" within the meaning of the Fourth Amendment is a complex and important question. But it is a question that need not, and should not, be resolved in this case. Even if this Court were to rule that the state is correct, and that the initial detention was not an "arrest", and therefore did not require probable cause, and were to rule, in addition, that the detention was "reasonable" under the circumstances, the consequence of those rulings would simply be that the state could constitutionally detain Summers in the house, just as it detained the other

seven occupants of the house. [5] But the state does not contend that a non-arrest detention authorizes a full-scale search incident to the detention. [6] Whether the state could subsequently "arrest" or "search" Summers would have to be determined first by reference to state law and then, if state law permitted the arrest or search, by reference to the Fourth Amendment.

In the circumstances of this case, as we show infra, state law did not permit either an arrest or a search of Summers,

---

[5] The United States, as amicus curiae urges the Court not to decide the second question (whether the search was reasonable) on the present record, but to remand for consideration of relevant facts, including the duration of the detention. (U.S. Br., Point IB)

[6] This Court has ruled that police can "frisk" or "pat down" a non-arrested but detained person, in order to find weapons, if they reasonably suspect that the person is armed and might injure them. But that limited
(footnote cont'd on next page)

even after narcotics were found on the premises of which he was the acknowledged owner. Accordingly, exclusion of the evidence found pursuant to the search of his person was required as a matter of state law (as the trial court and the Court of Appeals both found). Since the evidence would be excluded in order to enforce state law, it would not be necessary for this Court to decide whether the exclusionary rule should apply in the circumstances of this case in order to enforce the Fourth Amendment, or whether the Fourth Amendment permits "a search of reasonable scope and intensity of persons on the pre-

---

(footnote cont'd from previous page) weapons frisk does not authorize the full scale search of a person that occurred in this case. And the Michigan Supreme Court found as a fact that "the defendant's conduct at no time gave a basis for the officers to suspect unlawful activity on his part or to fear for their safety. Indeed, the officers chose not to frisk the defendant." A 22.

mises during a lawful search." [7] Where, as here, state law forbids a search, it is not necessary to decide whether the Fourth Amendment would permit one.

Thus, since the evidence would be suppressed under state law, regardless of whether the initial detention was constitutional under the Fourth Amendment, a decision by this Court on the constitutionality of the detention would be in the nature of an advisory opinion. [8]

---

[7] Although the evidence found on defendant's person would not have been found but for his "detention," and would be excludable as a fruit of that detention, were it held unconstitutional, the evidence was actually found as a result of his subsequent arrest for possession of the narcotics found in the basement, and was therefore excludable under state law as the direct product of an unlawful "arrest."

[8] As Justice Jackson wrote in Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945):

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and
> (footnote cont'd on next page)

Whenever there are independent and adequate state grounds for a ruling, or even ambiguity as to whether that ruling rested on state or federal grounds, the Court should decline to decide the federal question asserted to be present. See, e.g., State of California v. Krivda, 409 U.S. 33 (1972); see also Mental Hygiene Department of California v. Kirchner, 380 U.S. 194 (1965). Thus, consistent with

---

(footnote cont'd from previous page)
independent state grounds....The reason is so obvious that it has rarely been thought to warrant a statement, it is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion. (emphasis added).

"the policy of not passing upon questions of a constitutional nature which are not clearly necessary to a decision of the case," Minnesota v. National Tea Company, 309 U.S. 551, 555 (1940), the Court should decline review of the Fourth Amendment issues and dismiss the writ of certiorari as improvidently granted.

A. Defendant's Arrest And The Search of His Person Incident to That Arrest Were Not Authorized Under State Law.

At the trial court level, the sole argument advanced by the state to justify the search of defendant's person was that the search was incident to a valid arrest. [9] JA 53-57. The state sought to justify the arrest on the ground that the finding of

---

[9] In the Court of Appeals the state claimed, in addition, that the search of defendant's person was directly authorized by the warrant to search the premises. We will discuss that claim in point I B infra.

narcotics on the premises, coupled with defendant's acknowledgement that he was the owner of the premises, was sufficient to constitute probable cause for an arrest. JA 56.

The trial court ruled, as a matter of state law, that the presence of narcotics in the premises coupled with defendant's ownership of the premises did not constitute probable cause to believe that defendant had committed the crime of "knowing possession," as defined by Michigan law. JA 55-58. [10] The authority relied

---

[10] And in fact, the state never indicted or prosecuted defendant Summers for possession of the narcotics found in the basement, only for the narcotics found on his person after he was arrested. If the state really believed the arrest was based on probable cause, it is difficult to understand why defendant was not prosecuted for possession of the narcotics found in the basement.

upon by the trial court for that ruling was a Michigan case, People v. Davenport, 39 Mich. App. 252, 197 N.W. 2d 521 (1972), JA 56. Davenport made clear that Michigan law defines the crime of "knowing possession" of narcotics quite narrowly. The Michigan statute under which defendant Summers was arrested provides: "It is unlawful for any person knowingly or intentionally to possess a controlled substance...." Mich. Comp. L. Ann. 335.341(4)(a)(West 1975). Basically, under Michigan law, the mere presence of narcotics in a house, coupled with a defendant's non-exclusive occupancy (or ownership) of the house, does not constitute "knowing possession" or warrant an inference that the defendant knowingly possesses the narcotics.

If other occupants of the house "had equal access" to the area where the narcotics were found, it "is not reasonable to infer"

that one occupant, rather than another, was the possessor. Davenport, 39 Mich. App. 256-257, A 8. That is so because Michigan law precludes a finding of knowing possession whenever there are "innocent theories -- unrebutted by any evidence -- which accord with the facts." Davenport, id., A 8. Thus, under Michigan law, as interpreted by the state's single Court of Appeals, whenever persons other than the defendant had equal access to the searched premises, "an additional independent factor linking the defendant with the narcotic must be shown." Davenport, id., A 8.

On appeal, the Court of Appeals agreed that People v. Davenport was "controlling", A 7, and affirmed the trial court's conclusion that there was no probable cause to arrest and that "the seizure of the heroin involved here cannot be justified as the product of a search incident to arrest." A 11-12.

The Court of Appeals acknowledged that there is a difference between the "quantum of proof" necessary to support a conviction, and to support an arrest, but ruled under Michigan law that "there still must be some evidence of the type or quality necessary to support a conviction" in order to justify an arrest. A 9. It concluded that "there must be at least some evidence of an additional independent factor linking the defendant with drugs found on the premises, although the weight to be given to the factor need be less to support an arrest." A 9. The Court of Appeals found (and this is not seriously disputed) that "in the instant case, none of those additional factors were present." A 11. Thus, under Michigan law, the officers did not have sufficient "additional evidence" to justify arresting Summers "for knowingly possessing the drugs

found in the basement of his house." A 12. [11]

On further appeal, the majority of the Michigan Supreme Court did not find it necessary to decide the validity of the arrest under People v. Davenport. But there is no reason to suppose the majority would not have found Davenport controlling, if it had reached that issue. Although the dissent argued that Davenport was not controlling and that "the Court of Appeals reliance" on Davenport "was misplaced", A 39, the majority did not adopt

---

[11] It is at least arguable (although we would have a different view), that Michigan could define its crime of possession of narcotics more broadly, and could eliminate its requirement of "some additional evidence" to justify an arrest or perhaps its requirement of "knowing" possession , without violating federal constitutional provisions. But certainly Michigan can choose substantive and evidentiary rules that are more protective of the liberty of potential defendants than would be required by federal law.

that view and there is no reason to suppose the majority would adopt such a limiting construction of Davenport. To the contrary, Judge Levin, who wrote the opinion in Davenport while he was a judge on the Court of Appeals, joined the majority opinion in this case. 12/

B. Under State Law, The Warrant to Search The Premises Did Not of Itself Authorize A Search of Defendant's Person.

In the Court of Appeals the state argued for the first time that under the Michigan statute authorizing the issuance

---

12/ Even if it is not absolutely certain that the Michigan Supreme Court would find Davenport controlling, the express reliance on Davenport by the trial court and the Court of Appeals should be dispositive here. Certainly, in these circumstances, this Court could not conclude that the arrest was authorized by Michigan law without at least remanding to the Michigan Supreme Court for clarification.

of search warrants, the search warrant for the premises authorized the search of defendant's person even if there were no arguable basis for an arrest -- i.e., even before narcotics were found on the premises, and even if narcotics had never been found on the premises. The Court of Appeals rejected "all of these legal bases for the search", A 5, and did so on state law grounds. 13/

13/Contrary to the state's argument, federal law would also compel the conclusion that the search of defendant's person cannot be justified by the premises search warrant itself. The state argues that a search of defendant's person is no different from a search of a "container" or other inanimate object found on the premises because "the pockets of persons are places within the premises just as are desk drawers and closets." (Pet. Br. 27). This argument is inapplicable here because defendant was found outside the place to be searched and, unlike the cases cited by the state, his leaving was not triggered by the arrival of the police. Furthermore, it ignores the separate notion of personal privacy and autonomy reflected in the language of the Fourth Amendment, which expressly distinguishes between "persons" (footnote cont'd on next page)

The Court of Appeals concluded that the "prosecutor misses the point of the statute," A 5. That court construed the statute to provide that "the magistrate could have issued a warrant to search any individual found on the premises, but he did not do so." A 6. The Court of Appeals then ruled, as a matter of law, that the Michigan statute authorized the

---

(footnote cont'd from previous page)
or "things" to be searched or seized. The only circumstances in which the state would require this additional authority to search persons pursuant to a premises search warrant are situations where the state would not otherwise have probable cause or constitutional authority to arrest or search. Such an extension of the scope of a premises search warrant would constitute general authority to search all those found on the premises or even all persons connected with the premises, wherever they are found. Because open-ended or general warrants are constitutionally prohibited under the Fourth Amendment, "a warrant to search a place cannot normally be construed to authorize a search of each individual in that place," Ybarra v. State of Illinois, 444 U.S. 85, 92 n.4 (1979), and it certainly should not be construed to authorize search of a presumptively innocent person not found on the premises.

search of persons on premises to be searched if, and only if, they were named in the search warrant.

The Court of Appeals did not reach the state's second argument -- that presence "in the house" could justify a search of the person even if that person's clothing would not be considered a "place" within the meaning of the state statute -- because respondent was not found in the house. But the court ruled, under state law, that no state interest justified the search of persons found outside the premises. A 6-7.

In summary, since neither the arrest nor the search of respondent were authorized by state law, it is not necessary for this Court to decide whether the initial detention which led to the arrest and search was constitutional; even if it were, the evidence seized from his person would have been suppressed as a matter of state law. Accordingly, the writ should be dismissed as improvidently granted.

II. IF THE COURT DECIDES THE CASE IS PROPERLY BEFORE IT, THE IN-HOUSE DETENTION OF RESPONDENT DURING THE EXECUTION OF THE SEARCH WARRANT SHOULD BE HELD AN UNREASONABLE SEIZURE UNDER THE FOURTH AMENDMENT.

If the Court rejects our argument that the writ of certiorari should be dismissed as improvidently granted, and therefore reaches the question of the constitutionality of the in-house detention of Summers, the detention should be held an unreasonable seizure [14] of his person under the Fourth Amendment.

---

[14] The police clearly "seized" Summers within the meaning of the Fourth Amendment when they detained him on the front porch and brought him into the house. Seizures of persons include arrests, e.g., Henry v. United States, 361 U.S. 98 (1959), investigatory detentions, Davis v. Mississippi, 394 U.S. 721, 726-27 (1969), and any other detention of persons against their will. See e.g., Brown v. Texas, 443 U.S. 47, 50 (1979); Dunaway v. New York, 442 U.S. 200, 207 n.6 (1979). All that is required is that an "officer, by means of physical force or show (footnote cont'd on next page)

Traditionally, the Fourth Amendment's guarantee against unreasonable seizures of persons was analyzed in terms of probable cause to arrest. See, e.g., Brinegar v. United States, 338 U.S. 160, 176 (1949). The Court first departed from the rule that probable cause must justify all police seizures in Terry v. Ohio, 392 U.S. 1 (1968). As discussed in Dunaway v. New York, 442 U.S. 200, 219 (1979), Terry departed from traditional Fourth Amendment analysis in two respects:

> First, it defined a special category of Fourth Amendment "seizures" so substantially less intrusive than arrests that the general rule requiring

---

(footnote cont'd from previous page) of authority, has in some way restrained the liberty of a citizen." Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968). Here the trial court found that Summers was involuntarily taken into the house by the police. JA 58.

> probable cause to make Fourth Amendment "seizures" reasonable could be replaced by a balancing test. Second, the application of this balancing test led the Court to approve this narrowly defined less intrusive seizure on grounds less rigorous than probable cause, but only for the purpose of a pat-down for weapons.

Thus, the reasonableness of certain seizures that are substantially less intrusive than a traditional arrest depends on "a balance between the public interest and the individual's right to personal security free from arbitrary interference" by police. Brown v. Texas, 443 U.S. 47, 50 (1979), quoting Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977).

The Court has been careful to maintain Terry's narrow scope by permitting "stops" on less than probable cause only in two very limited categories of cases.

The first, outlined by Terry, is a limited on-the-street stop by police, based on "specific and articulable facts," to investigate suspicious persons or circumstances, and a frisk for weapons when police have "reasonable grounds to believe" that the person stopped is armed and dangerous. Terry v. Ohio, supra at 21; Sibron v. New York, 392 U.S. 40, 63 (1968); see Adams v. Williams, 407 U.S. 143 (1972). This categorical exception permits an officer to order a driver to get out of his or her vehicle after the vehicle has been lawfully detained for traffic violations, and permits a frisk of the driver if the officer has a reasonable suspicion that the driver is armed and dangerous. Pennsylvania v. Mimms, supra. The Court again emphasized the safety of the officer as compared to the "de minimis" intrusion of the requirement to exit the vehicle once it had lawfully been stopped. Id. at 111.

The second category arises in the special context of brief interrogation stops near the United States border to check suspicious automobiles for illegal aliens, United States v. Brignoni-Ponce, 422 U.S. 873 (1975), or a fixed checkpoint to stop and check automobiles for aliens. United States v. Martinez-Fuerte, 428 U.S. 543 (1976). Even in the context of border patrol stops, however, the officer may briefly question the driver and passengers about their citizenship and immigration status and any suspicious circumstances, but "any further detention or search must be based on consent or probable cause." United States v. Brignoni-Ponce, supra at 881-822; Accord, United States v. Martinez-Fuerte, supra at 567.

In the instant case, the state urges the Court to extend Terry in order to approve a third category of "seizures" on

grounds less rigorous than probable cause: detentions of persons "on or departing from" [15] the premises during execution of a search warrant "until the search is completed." (Pet. Br. 13). The state concedes that whether particular detentions of that type are constitutionally permissible should not be left to the ad hoc judgment of the police on a case-by-case basis, and argues instead that all such detentions should be authorized in advance by the Court as a "generic" exception to the probable cause requirement. (Pet. Br. 11-12). [16]

---

[15] Summers was departing from the house when the police arrived. This case does not therefore raise the issue of the constitutionality of detentions of persons found inside the premises to be searched.

[16] The United States takes the position, as amicus curiae, that the Terry balancing test should be applied by police on a case-by-case basis, and that "extended detentions of limited duration can comport with the demands
(footnote cont'd on next page)

Such a categorical exception to the probable cause requirement is not justified, in the circumstances of this case, under the balancing test adopted by this Court for determining the constitutionality of such seizures.

As both the state and the amicus brief of the United States acknowledge, and as this Court ruled in Brown v. Texas, supra

---

(footnote cont'd from previous page)
of the Fourth Amendment if they are reasonable in light of the circumstances confronting the officers at the time." (Amicus Br. of United States, Summary of Argument) However, the problems inherent in application of a multi-factored balancing test on a case-by-case basis are well-recognized by the Court. See Dunaway v. New York, supra at 214. As conceded by the state, the "balancing test is 'too subtle and sophisticated a device to be workable in day-to-day practice,'" and it would be "'clearly asking too much to expect policemen to make on-the-spot judgments in this way....'" [citation omitted]. (Pet. Br. 11-12).

at 51, the constitutionality of an exception to the ordinary requirement of probable cause "involves a weighing" of (a), the "gravity of the public concerns served by the seizure" and the "degree to which the seizure advances the public interest," compared with (b), the "severity of the interference with individual liberty." (Pet. Br. 10; U.S. Br., Point I)

A. In The Circumstances Of This Case, The Categorical Exception Urged By The State Would Not Advance Any Important Government Interest.

The state has advanced only three governmental interests: 1) protecting the "safety of the officer"; 2) avoiding "frustration of the warrant", and 3) "the warrant itself." (Pet. Br. at 13)

For purposes of this brief, we will assume, arguendo, that protecting the safety of officers and preventing frustration of

search warrants are important governmental interests. Those interests, however, would not be advanced by adoption of a categorical exception for persons who are leaving or who have left the premises to be searched. The third interest addressed by the state is either indistinguishable from the second, or is so broad that it would allow states to arrest without probable cause anyone connected with premises which are the subject of a search warrant, even if those persons are hundreds of miles from the premises and have no knowledge that the search is taking place.

1. Officer safety.

The Michigan Supreme Court found as a fact that respondent's "conduct" did not raise in the officers' minds, or justify, reasonable suspicion of criminal activity, or that he was armed. A 22. If it had, the officer could have detained and frisked him under Terry, and the state would not

need to urge a broader categorical exception in the interests of safety. Accordingly, the state is asking the Court to rule that even if an individual's conduct is not suspicious, that individual may be detained and frisked simply because he or she is leaving premises covered by a search warrant. In effect, the state is asking the Court to create a per se presumption that anyone leaving such premises may reasonably be deemed dangerous to the officers. [17] That presumption

---

[17] This case presents the rare circumstance of the police arriving to execute a premises search warrant precisely at the moment someone is leaving the premises and walking down the front porch steps. The infrequency of such an occurrence, and the limited issues raised by such facts, present another basis for the Court to dismiss the petition for certiorari as improvidently granted.

is not reasonable. [18] But even if it were, it would authorize, at most, only a brief stop and frisk for weapons. If no weapons were found, "police safety" would not justify further detention for the duration of the search. [19] Alternatively, if the state is not arguing for the right to frisk, but only for the right to detain,

---

[18] In this case, for example, the police did not frisk defendant Summers for weapons either when they detained him on the front porch or when they brought him back into the house to "secure" the premises, and as noted, the Michigan Supreme Court found as a fact that the police did not fear for their safety.

Aside from the unreasonableness of such a per se presumption in the circumstances of this case, however, the presumption is also unreasonable as a general rule. For example, although in this case the police searched a single-family dwelling, other searches could involve multi-story apartment buildings, with many people leaving and entering the premises. It would be unreasonable to presume that all persons leaving the building as the police arrived would present a danger to the officers.

[19] Although it is highly unlikely, it is at least conceivable that further detention is
(footnote cont'd on next page)

it cannot seriously be argued that bringing a possibly armed and dangerous individual inside the searched premises, without a frisk, will promote the safety of the officers in the premises during the search.

2. Frustration of the warrant.

It is at least conceivable that persons inside the premises, if free to roam from room to room, could frustrate execution of a warrant by destroying or

---

(footnote cont'd from previous page) necessary to prevent those frisked from going out, acquiring weapons, and returning to confront the police. Such a precaution, however, would also justify the round-up and detention of anyone walking by the premises being searched, or indeed, anyone who might learn of a search in progress. It would also justify preventing those in the searched premises from making or receiving telephone calls during the search. The remote possibility that an unarmed and presumptively innocent person who is not subject to arrest would, if released, acquire weapons and return to attack the police is far too speculative to justify extended detention.

concealing evidence or contraband before the officers reached and searched that particular room. [20] But as the Michigan Court of Appeals noted, A 6-7, persons found outside the premises cannot frustrate execution of a warrant.

Although the state argues that persons leaving the premises could summon help and return to frustrate the warrant, it is highly speculative that this would ever occur. The slight possibility that persons would return and successfully frustrate the execution of a warrant does not justify further detention.

---

[20] However, since defendant was found outside the premises, it is neither necessary nor appropriate for this Court to decide in this case whether it would be constitutional to create such an exception for persons already inside the premises. And, as noted, the Court of Appeals expressly declined to reach this question.

3. The "warrant itself".

Frankly, we do not understand this argument. If the state is arguing that a premises search warrant justifies detention of anyone connected with the premises, even if that person could not conceivably frustrate execution of the warrant, that argument would permit the police to range far from the premises, to a person's office, for example, to detain a person connected with the premises until the search is completed. Such a detention could not be justified by the warrant itself.

In short, the categorical exception urged by the state is not necessary to advance any legitimate state interest. Accordingly, the proposed exception would be unconstitutional even if the intrusion on the individual were quite minimal. That should end the inquiry. But as we now show,

even assuming arguendo that important state interests would be advanced by the proposed exception, the intrusion on the individual is so severe that, on balance, the proposed exception should be rejected.

B. The Intrusion On The Individual That Would Be Authorized By The Categorical Exception Urged By The State Would Be Much More Severe Than The De Minimis Intrusion Authorized In Terry and Mimms.

Balanced against the governmental interests advanced by the state is the severity of interference with individual liberty posed by such a categorical rule. The state argues that the rule should permit detention of persons departing from the premises "until the search is

completed." [21] Pet. Br. 13.

Although it is not clear from the record what the duration of the search was in this case, detention until the search is completed could mean being held on the premises for many hours. [22] Such a deten-

---

[21] The United States, as amicus, argues that such detentions are permissible for a "reasonable" period of time, leaving for future litigation whether reasonableness should be measured in the abstract, or in reference to the scope and difficulty of the premises search. If the latter, that rule would itself spawn time consuming litigation on a case-by-case basis. In any event, the state's position is not so limited. The justifications advanced by the state to support detentions during execution of the search warrant presuppose detention of persons on the premises "until the search is completed." Pet. Br. 13.

[22] Depending on the size of the premises, a search for easily concealed items could take many hours. In Harris v. United States, 331 U.S. 145 (1947), for example, an FBI search of a one-bedroom apartment for two checks and burglar tools took five hours. Recent FBI searches of Scientology Church offices have taken between ten and twenty hours to complete. See, e.g., In re Search Warrant, Misc. No. 77-0151 (D.D.C., Aug. 24, 1979).

tion constitutes a particularly severe intrusion when the person has chosen to leave the premises. Thus, persons on their way to work or to an appointment could be detained on the premises for many hours, until the police complete the search. Surely this intrusion is more than "de minimis" and constitutes more than "modest inconvenience" to people detained in a "place they have chosen to frequent," as argued by the state. Pet. Br. 14.

Moreover, taking persons back into the premises during execution of a search warrant could expose presumptively innocent persons to heightened danger from possible resistance to police search by persons inside the premises.

The categorical exception urged by the state could thus intrude on the personal liberty and safety of large numbers of people, for substantial periods of time.

Although the instant case involved a two-story dwelling, such an exception presumably would also sanction detention of all persons leaving a twenty-story apartment building when police arrive to execute a search warrant of an apartment in the building. Application of the exception in such circumstances would result in detention of persons not connected in any way to the specific apartment to be searched. Cf. Ybarra v. State of Illinois, 444 U.S. 85 (1979).

A rule authorizing the seizure of persons leaving the premises when the police arrive to execute a search warrant would not advance any public interest in police safety or in execution of search warrants and would in any event be outweighed by the significant intrusion and interference with individual liberty that would be permitted under such a rule. Thus, in the circumstances of this case, the

Court should not recognize a new categorical exception to the probable cause requirement for extended detentions or arrests.

III. THE COURT SHOULD NOT APPLY A "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE IN THIS CASE.

A. This Is Not An Appropriate Case In Which To Consider Adoption Of A "Good Faith" Exception To The Exclusionary Rule.

Amicus agrees with the United States, although for different reasons, that this case does not present an appropriate occasion for deciding whether to adopt a "good faith" exception to the exclusionary rule. [23] As discussed supra, Point I,

---

[23] The United States, amicus curiae, argues that this case does not present the broad question of a general "good faith" exception to the exclusionary rule because the rule should not be applied under traditional retroactivity principles.

the police did not seize any evidence as a direct result of the detention. Rather, the evidence was seized as the direct result of a search incident to defendant's arrest, which was held, under state law, to be an illegal arrest. The state does not claim that a categorical exception for detention of persons during execution of a search warrant would authorize a search of persons so detained, other than a frisk for weapons, and no such search occurred in this case. If respondent Summers had been detained and searched for weapons as a result of an unconstitutional Terry-type stop-and-frisk, for example, and the police had found heroin or weapons, the question would have been squarely presented whether such evidence should be excluded to enforce the Fourth Amendment. Here, however, the evidence seized was merely an indirect product of an unconstitutional detention, and was suppressable under state law as the direct product of

an illegal arrest.

Similarly, even if we were to assume, arguendo, that the police acted in "good faith" when they unconstitutionally "detained" respondent, their "good faith" at that time would not justify an exception to the exclusionary rule if they acted in "bad faith" when they later arrested and searched respondent (the direct and proximate cause of the illegally seized evidence), in violation of settled state law.

Although the record on this point is incomplete (which itself makes this case an inappropriate occasion to consider adoption of a good faith exception to the exclusionary rule) everything that is in the record points strongly to the conclusion that the officers knew, or should have known, that they did not have probable cause to arrest. Both the trial court and the Court of Appeals ruled that the officers did not have probable cause to arrest under People v. Davenport,

which was decided two years before the arrest. Davenport, like this case, involved an arrest for possession of narcotics found in the basement of a defendant's home. Police officers can reasonably be held responsible for knowledge of settled state law governing arrests for possession of narcotics. 24/ There was never even an attempted prosecution of respondent for possession of the narcotics found in his basement -- the ostensible basis for his arrest. In these circumstances, therefore, the record suggests that the officers acted in "bad faith" when they arrested respondent.

24/ Since the state law was settled, it is not necessary for this Court to resolve the issue of the "retroactivity" of federal law posed by the United States. U.S. Br., Point II.

B. The Evidence Seized As An Indirect Result Of The Unconstitutional Detention Should Be Excluded Even If The Officers Acted In Good Faith, At That Time.

The state urges the Court to create a "good faith" exception to the exclusionary rule, and it urges the Court to do so even when the officers' actions were not undertaken pursuant to a specific state statute not previously found unconstitutional, or a long-established policy or practice. 25/ The state argues that even if the Court finds that the search of respondent's person cannot be justified as incident to his subsequent arrest

---

25/ We believe there should be no such exception even when a presumptively valid statute or long-established practice provide an objective basis for a finding of good faith. But without such an objective basis, a good faith exception to the exclusionary rule would turn almost entirely on subjective and elusive factors and would therefore give more deference to the ad hoc judgments of police than would be consistent with reasonable protection of Fourth Amendment rights.

The state argues also that the exclusionary rule should not be applied if the Court holds that the search of his person was not justified (footnote cont'd on next page)

because the initial in-house detention was unconstitutional, [26] the detention was undertaken by the officers in a "good faith reasonable belief" that it was proper, and therefore the evidence obtained from the unconstitutional search and seizure should not have been excluded. (Pet. Br. 33). The state argues that the purpose of the exclusionary rule will not be served by exclusion of the evidence in this case.

(footnote cont'd from previous page)
by the warrant to search the premises. The Court need not, and should not, address this issue because the Michigan Court of Appeals rested its decision on state law, and the Michigan Supreme Court did not reach the issue. Moreover, the officers themselves justified the search as incident to an arrest, not pursuant to the premises search warrant.

[26] The record contains no indication that the police acted pursuant to an express policy or long-standing practice of detaining persons leaving the premises to be searched pursuant to a warrant.

The exclusionary rule serves two important functions. A principal purpose of the exclusionary rule is to deter unlawful police conduct. United States v. Calandra, 414 U.S. 338, 347 (1974). Without it, the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words." Mapp v. Ohio, 367 U.S. 643, 655 (1961). It "also serves another vital function -- 'the imperative of judicial integrity.'" Terry v. Ohio, supra at 12-13, quoting Elkins v. United States, 364 U.S. 206 (1960).

These two purposes of the exclusionary rule are closely related and should be viewed as part of a system of deterrence rather than as an "instrument for 'deterring' discrete and specific episodes of unconstitutional police behavior." 27/ See Amsterdam, "Perspectives

---

27/ The deterrent effect of the exclusionary rule should not be judged solely by its effect on individual police officers. The rule also serves to deter police departments and state legislatures from adopting policies or laws (footnote cont'd on next page)

on the Fourth Amendment," 58 Minn. L. Rev. 349, 432 (1974):

> The admission of unconstitutionally seized evidence is therefore not, as the critics of the exclusionary rule assume, merely something that happens after "a violation" of the Fourth Amendment has occurred, and when it is too late to prevent, impossible to repair, and senseless to punish the government for that violation. It is the linchpin of a functioning system of criminal administration that produces incentives to violate the Fourth Amendment.[28/]

The exclusionary rule counteracts the incentives toward unreasonable searches and seizures which exist in the system itself.

(footnote cont'd from previous page) inconsistent with Fourth Amendment rights. See Torres v. Commonwealth of Puerto Rico, 442 U.S. 465 (1979).

28/ The state's brief quotes a previous article by Professor Amsterdam, Pet. Br. 37, in which he takes a position specifically disavowed in his later examination of the purposes of the exclusionary rule. See Amsterdam, "Perspectives on the Fourth Amendment," 58 Minn.L.Rev. 349, 476 n.598.

Under this view of the "general" deterrent purpose of the exclusionary rule, the application of the rule does not depend on the subjective "good faith" of the officers in a specific instance in which Fourth Amendment rights are violated. 29/ Instead, application of the rule depends upon an analysis of whether exclusion of the evidence would serve the purpose of deterring such violations by police, police departments, or legislatures, in the broader context of the overall system of criminal justice. Accordingly, this Court has refused to apply the exclusionary rule only in very limited circumstances and only with respect to peripheral uses of illegally obtained evidence, e.g.,

---

29/ There is nothing in the record to indicate whether the individual officers who detained Summers had a "good faith belief" that the in-house detention was lawful.

United States v. Janis, 428 U.S. 433 (1976) (state-seized evidence in an IRS assessment proceeding); Stone v. Powell, 428 U.S. 465 (1976)(collateral federal review of state convictions); United States v. Calandra, 414 U.S. 338 (1974)(grand jury proceedings). The Court has also refused to apply the exclusionary rule in certain cases in which a new constitutional principle is not retroactively applied. See, e.g., United States v. Peltier, 422 U.S. 531, 535 (1975); Michigan v. Tucker, 417 U.S. 433 (1974). The Court, however, has held that the rule requires suppression of evidence obtained in searches carried out pursuant to statutes, not previously declared unconstitutional, which purport to authorize searches without probable cause and without a valid warrant. See, e.g., Torres v. Commonwealth of Puerto Rico, 442 U.S. 465

(1979); Sibron v. New York, 392 U.S. 40 (1968).[30]

Certainly in this case, where the state does not assert that the police were acting in conformity with statutory authority or with established policy, the evidence should not be excluded because of the "good faith" of the officers. Moreover, the Court has consistently reaffirmed the narrow scope of investigatory detentions permitted by Terry, recognizing only two narrow categorical exceptions to the probable cause requirement.[31]

---

[30] As noted by this Court, Michigan v. DeFillippo, 443 U.S. 31 (1979) is not inconsistent with these cases. In DeFillippo, the Court upheld the validity of the arrest made for violation of an ordinance later declared unconstitutional, and therefore did not reach the exclusionary rule issue.

[31] See discussion in Point II, supra. Retroactivity principles therefore do not preclude application of the exclusionary rule in this case.

If the exclusionary rule is not applied in this case, the police will be offered an incentive to detain persons in other situations not now covered by a categorical exception. The deterrent value of the exclusionary rule is therefore directly served by exclusion of the evidence in this case. 32/

Finally, if there were a good faith exception to the exclusionary rule, every state court suppression hearing would have to consider not only whether the search was constitutional, but also, if not, whether the officer nevertheless acted in good faith. An exception would require addi-

---

32/ Because the deterrent purpose of the exclusionary rule is served by exclusion in this case, we need not consider separately the question of the other function of the exclusionary rule, preservation of judicial integrity. See generally Mapp v. Ohio, supra; Elkins v. United States, supra; Schrock and Welsh, "Up from Calandra: The Exclusionary Rule as a Constitutional Requirement," 59 Minn. L. Rev. 251 (1974).

tional evidence and testimony, would cause substantial delays in already clogged criminal justice systems, and would provoke time and resource consuming appeals over the often subtle question of whether the officer acted in good faith.

CONCLUSION

The Writ of Certiorari should be dismissed as improvidently granted. In the alternative, the judgment below should be affirmed.

Respectfully submitted,

MARY L. HEEN
BRUCE J. ENNIS, JR.,
(Counsel of Record)
CHARLES S. SIMS
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

LAWRENCE HERMAN
Ohio State University
College of Law
1659 N. High Street
Columbus, Ohio 43210

Attorneys for Amicus

NO. 79-1794

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

PEOPLE OF THE STATE OF
MICHIGAN, Petitioner

V.

GEORGE SUMMERS, Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MICHIGAN

MOTION OF JOHN B. HOLMES, JR. AS DISTRICT ATTORNEY OF HARRIS COUNTY, TEXAS, AND AMERICAN LEGAL FOUNDATION, FOR LEAVE TO FILE AMICUS CURIAE BRIEF

****

AMICUS CURIAE BRIEF, OF JOHN B. HOLMES, JR., AS DISTRICT ATTORNEY OF HARRIS COUNTY TEXAS, AND AMERICAN LEGAL FOUNDATION, URGING REVERSAL

JOHN B. HOLMES, JR.
CALVIN HARTMAN
District Attorney's Building

Of Counsel:
Gray Miller
Fulbright & Jaworski

Richard F. Callaway, Jr.
Butler, Binion, Rice,
Cook & Knapp

Michael C. Kuhn
Bracewell & Patterson

DAVID CRUMP, Counsel
of Record
George O. Jacobs
c/o American Legal Foundation
5450 Fieldwood Drive
Houston, Texas 77056
(713) 749-3878
Attorneys for Amici Curiae

NO. 79-1794

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

PEOPLE OF THE STATE OF

MICHIGAN, Petitioner

V.

GEORGE SUMMERS, Respondent

MOTION OF JOHN B. HOLMES, AS DISTRICT ATTORNEY OF HARRIS COUNTY, TEXAS, AND AMERICAN LEGAL FOUNDATION, FOR LEAVE TO FILE AMICUS CURIAE BRIEF URGING REVERSAL

John B. Holmes, as District Attorney of Harris County, Texas, and American Legal Foundation, movants, hereby respectfully request leave to file a brief amicus curiae urging reversal of the judgment of the Supreme Court of Michigan. The interest of Amici is set forth in a section entitled

"Interest of Amici Curiae" in the brief annexed hereto, which section is adopted in this motion as though set out at this point.

District Attorney John B. Holmes is the authorized law officer of a political subdivision of Texas and files this brief under authority of Rule 36.4 of the Rules of this court, under which consent is not required. American Legal Foundation has sought consent. Such consent has been orally given by the State of Michigan, though no written consent has been received. Counsel for the accused did not state whether he would consent when first contacted, and amici have been unable to contact him further; accordingly, these amici have filed this motion.

An amicus curiae brief is desirable because this case presents the issue whether reasonable, good faith conduct of law enforcement officers should result in

exclusion of evidence whose seizure is subsequently adjudicated unlawful. The diverse policy arguments underlying the exclusionary rule, the complex history of its adjudication and the alternative bases for disposition presented in this case are reasons for believing that this important issue may not be completely developed without amicus participation. Amici have continuing experience with and interest in this issue and may be able to aid the Court in developing the case fully.

Respectfully submitted,

David Crump
Attorney for Amici Curiae
c/o American Legal Foundation
5450 Fieldwood Drive
Houston, TX 77056
(713) 749-3878

TABLE OF AUTHORITIES

CASES:

Arkansas v. Sanders, 442 U.S. 752 (1969)--26

Carroll v. United States, 267 U.S. 132 (1925)----------26

Chambers v. Maroney, 399 U.S. 42 (1970)---26

Chimel v. California, 395 U.S. 752 (1969)-26

Coolidge v. New Hampshire, 403 U.S. 433 (1971)----------26

Harris v. New York, 401 U.S. 222 (1971)---26

Husty v. United States, 282 U.S.694 (1931)26

Mapp v. Ohio, 367 U.S. 643 (1961)---------14, 17

Michigan v. Tucker, 417 U.S. 433 (1974)---15, 25

Preston v. United States, 376 U.S. 364 (1964)----------26

Snyder v. Massachusetts, 291 U.S. 97 (1934)----------18

Stone v. Powell, 428 U.S. 465 (1976)------26

Texas v. White, 423 U.S. 67 (1975)--------26

United States v. Calandra, 414 U.S. 338 (1974)----------26

United States v. Ceccolini, 435 U.S. 368 (1978)----------26

United States v. Peltier, 422 U.S. 531 (1975)----------26

United States v. Rabinowitz, 339 U.S. 56 (1960)----------26

United States v. Tucker, 404 U.S. 443 (1972)----------26

United States v. Williams, 622 F.2d 830 (5th Cir. 1980)----------passim--

Ybarra v. Illinois, 444 U.S. 85 (1979)----11

SECONDARY AUTHORITY:

N. JOHNSON, L. SAVITZ & M. WOLFGANG, THE SOCIOLOGY OF PUNISHMENT AND CORRECTION--

Rawitscher & Carnahan, Search and Seizure and Suppression Proceedings, in STATE BAR OF TEXAS, ADVANCED CRIMINAL LAW COURSE O-1 (D. Crump ed. 1979)------23

COUNCIL OF STATE GOVERNMENTS, DEFINITE SENTENCING: AN EXAMINATION OF PROPOSALS IN FOUR STATES (1976)----------28

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE---------- 7

SUMMARY OF ARGUMENT---------- 8

ARGUMENT AND AUTHORITIES---------- 11

I. IN WILLIAMS V. UNITED STATES, 622 F.2d 830 (5TH CIR. 1980)(EN BANC), THE FIFTH CIRCUIT RECOGNIZED "REASONABLE, GOOD-FAITH MISTAKE" AND "TECHNICAL VIOLATION" EXCEPTIONS TO THE EXCLUSIONARY RULE. THE WILLIAMS POSITION IS WELL REASONED AND SHOULD BE ADOPTED BY THIS COURT---------- 11

II. THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED WHEN THE PURPOSE OF DETERRING ILLEGAL POLICE CONDUCT WILL NOT BE SERVED---------- 14

III. THE PRINCIPLE THAT COURTS SHOULD AVOID THE TAINT OF ILLEGALLY SEIZED EVIDENCE DOES NOT MANDATE THE EXCLUSION OF EVIDENCE SEIZED REASONABLY AND IN GOOD FAITH. TO THE CONTRARY, IT IS THE EXCLUSION OF EVIDENCE OBTAINED HONESTLY AND REASONABLY THAT TAINTS A COURT-------- 17

NO. 79-1794

IN IN THE SUPREME COURT OF THE UNITED STATES
OCTOER TERM, 1979

PEOPLE OF THE STATE OF
MICHIGAN, Petitioner

V.

GEORGE SUMMERS, Respondent

BRIEF OF AMICI CURIAE JOHN B. HOLMES, AS DISTRICT ATTORNEY OF HARRIS COUNTY, TEXAS, AND AMERICAN LEGAL FOUNDATION

INTEREST OF AMICUS CURIAE

John B. Holmes is District Attorney of Harris County (Houston), Texas. He has responsibility for the prosecution of crimes within his jurisdiction.

American Legal Foundation ("ALF") is a nonprofit corporation acting as a public interest law firm. Among other goals, it seeks the preservation of a rational criminal justice system. In connection with this last objective, ALF is interested in limitation of the exclusionary rule

to situations in which the purposes of that rule are served.

It is the position of Amici Curiae that the search and seizure at issue in this case was lawful. Amici adopt the position of the State of Michigan in this respect. This brief addresses only the possibility that this Court might consider that the seizure in question was improper or erroneous. In that event, Amici would urge the court that evidence obtained through a good faith, reasonable error should not be excluded.

SUMMARY OF ARGUMENT

In the event that this court should decide that the seizure at issue was erroneous or unlawful, Amici would urge the court to adopt the analysis followed by the Fifth Circuit in United States v. Williams,

622 F.2d 830 (5th Cir. 1980) (en banc). In Williams, the Fifth Circuit recognized an exception to the exclusionary rule in the event of a "reasonable good-faith mistake" or a "technical violation."

The main premise underlying the exclusionary rule is that the rule deters illegal police conduct. In Williams, however, the Fifth Circuit correctly concluded that when an officer acts in the good-faith belief that his conduct is constitutional, and when he has a reasonable, articulated basis for that belief, the exclusionary rule cannot operate to deter his conduct. The standard adopted in Williams requires both a showing of honesty ("good faith") and an objective proof of articulated reasons for believing the search lawful ("reasonableness"), so that neither bad faith nor ignorance will be rewarded and the deterrence premise is fully served.

A second premise underlying the exclusionary rule is that a court should avoid the "taint" of illegally obtained evidence. This premise, however, does not mandate the exclusion of evidence seized reasonably and in good faith. To the contrary, the criminal process is tainted by the exclusion of such evidence, since it creates a public perception that meaningless technicalities control the law, demoralizes conscientious police officers, produces unnecessarily haphazard results, suggests to accused persons that innocence is irrelevant and forces courts into shifting and inconsistent positions. Thus both the "deterrence" rationale and the "taint" rationale support the adoption of a position such as adopted in Williams.

ARGUMENT AND AUTHORITIES

This brief adopts the position of petitioner State of Michigan that the seizure here in question was lawful. This factual situation is different from those in Dunaway v. New York and Ybarra v. Illinois, 444 U.S. 85 (1979). In the event, however, that this Court does not accept Michigan's position on these issues, it is respectfully submitted that the following analysis should be adopted.

I. IN WILLIAMS V. UNITED STATES, 622 F.2D 830 (5TH CIR. 1980), (EN BANC), THE FIFTH CIRCUIT RECOGNIZED "REASONABLE, GOOD-FAITH MISTAKE" AND "TECHNICAL VIOLATION" EXCEPTIONS TO THE EXCLUSIONARY RULE. THE WILLIAMS POSITION IS WELL REASONED AND SHOULD BE ADOPTED BY THIS COURT.

The holding of a majority of the Fifth Circuit in United States v. Williams was as follows:

> "Sitting en banc, we now hold that evidence is not to be suppressed under the exclusionary rule when it is discovered by officers in the

> course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized."

622 F.2d at 840. The Williams approach encompasses two situations. One is the reasonable, good-faith mistake, in which the officer makes a judgmental error concerning the existence of facts sufficent to authorize seizure, and he has reasonable and articulable basis for a belief in the lawfulness of his conduct. The other is the "technical violation." In this situation, the officer relies on a warrant that contains a typographical error, a statute that is later invalidated or a Supreme Court or other appellate decision that is later changed.

The Williams rule is carefully calibrated to serve the purposes of the exclusionary principle to the fullest. It requires, first, that the judgmental error be an honest one--that is, that it be in "good faith."

Secondly, it requires that the judgment be "objectively reasonable," so that ignorance or sloppiness will not be rewarded. The Fifth Circuit stated this latter requirement thus:

> "We emphasize that the belief, in addition to being held in subjective good faith, must be grounded in objective reasonableness. It must therefore be based on articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully. Thus a series of broadcast breakins and searches carried out by a constable--no matter how pure in heart--who had never heard of the fourth amendment could never qualify."

622 F.2d at 841 n.4a. The burden is on the Government to prove these elements.

The Williams opinion states, "The Supreme Court and this circuit have all but explicitly adopted the technical violation exception facet of the good-faith exception, and each has rendered several decisions that implicitly, at least, support the good-faith mistake facet . . . ." 622 F.2d at 841. It

is submitted that the Williams rule is fully consistent with this Court's decisions. The Williams opinion carefully analyzes relevant Supreme Court authority to prove this point, and that analysis of those decisions is adopted by this brief.

II. THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED WHEN THE PURPOSE OF DETERRRING ILLEGAL POLICE CONDUCT WILL NOT BE SERVED.

The exclusionary rule is not a requirement of the Constitution. Rather, it is motivated by the thought behind Justice Clark's famous dictum that "There is no war between the Constitution and common sense," and by the need for a mechanism to enforce the fourth amendment. Mapp v. Ohio, 367 U.S. 643 (1961). Since common sense was thus invoked to create the exclusionary rule, common sense should not be disregarded by extension of the doctrine beyond its purposes.

Such an extension would occur unless a reasonable, good-faith mistake exception

were recognized. As this Court stated in Michigan v. Tucker, 417 U.S. 433, 477 (1974),

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

The Williams approach avoids upholding "willful" misconduct by its good faith requirement. It avoids upholding even "negligent" blunders by requiring objective reasonableness. It is submitted that the Williams approach thus safeguards the deterrence purpose of the exclusionary rule to the fullest extent.

The case at bar is an example of the counterproductive application of the exclusionary rule beyond its purposes. A large amount of heroin was seized from the premi-

ses of an accused shown by a search warrant affidavit to be a seller of heroin. The sequence of events, in outline, was that officers went to execute the warrant, detained the accused briefly, searched his residence, found heroin, arrested him and seized more heroin from his person in a custodial search. The decision of the Michigan Supreme Court is that if the officers had not detained the accused initially at the scene, but had instead run after and caught him a few blocks away once the heroin was found in the house, the resulting arrest and custodial search would have been lawful. The distinction that thus frees an accused proven unequivocally to have committed a serious crime is so elusive that it is no more likely to be understood by the officer in the field than it is to command public respect. Furthermore, the principal basis of the Michigan Court's decision is Dunaway v. New York, which was not

even decided until five years after the seizure at issue and could not possibly have affected the officers' conduct.

III. THE PRINCIPLE THAT COURTS SHOULD AVOID THE TAINT OF ILLEGALLY SEIZED EVIDENCE DOES NOT MANDATE THE EXCLUSION OF EVIDENCE SEIZED REASONABLY AND IN GOOD FAITH. TO THE CONTRARY, IT IS THE EXCLUSION OF EVIDENCE OBTAINED HONESTLY AND REASONABLY THAT TAINTS A COURT.

A second premise that is sometimes said to underlie the exclusionary rule is that courts should avoid the taint of illegally seized evidence. Courts are nondemocratic institutions without enforcement mechanisms. If their orders are to prevail in unpopular as well as popular causes, they must have public respect. Thus Mapp v. Ohio, 367 U.S. 643 (1961), states that the exclusionary rule gives "to the courts, that judicial integrity so necessary in the true administration of justice." Although the Fifth Circuit

in United States v. Williams did not base its decision on analysis of this purpose, it too supports the Williams approach, because when a court admits evidence that an officer has obtained through good faith conduct reasonably undertaken, the court is not by any stretch of the imagination "tainted" thereby.

It is submitted, furthermore, that to the extent there is validity to this principle, it is the exclusion of honestly and reasonably seized evidence, not its reception, that actually taints a court.

A. Public Impression of Criminal Law as a Mass of Technicalities.

The first way in which exclusion in this instance taints the courts is by creating a public impression that the criminal law is a mass of dysfunctional technicalities. This danger was articulated by Justice Cardozo in the case of Snyder v. Massachusetts, 291 U.S. 97, 122 (1934), as follows:

> "There is danger that the criminal law will be brought into contempt--that discredit will even touch the great immunities assured by the Fourteenth Amendment--if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

Although the error in Snyder was exclusion of the defendant from proceedings and an improper remark of the trial judge, rather than an illegal seizure, the reasoning applies equally to the instant situation. A non-technican is likely to see little distinction in the difference, if indeed any, between the (lawfully seized) heroin in Summers' house and the (unlawfully seized) heroin on his person.

B. Haphazard Results on Guilt or Innocence.

Secondly, exclusion of evidence reasonably and honestly seized taints the criminal justice system by causing haphazard adjudication of guilt and innocence.

Inconsistent results are sometimes unavoidable under the Constitution, but they should not be encouraged when unnecessary. An incident that occurred in Harris County (Houston), Texas, several years ago illustrates the danger that can result. The District Attorney of Harris County presented seventy-three drug possession cases, some of which were appropriate for no-bills because of seizures that would require suppression and some of which were appropriate for true bills because of searches deemed valid. The grand jury, however, no-billed all cases in both groups, in part because it was apparently unable to rationalize differential treatment of the suspects on the basis of distinctions in the police conduct involved.* The haphazard adjudication that this grand jury impliedly condemned would not be removed entirely by adoption of the Williams approach, but it

would be lessened.

The instant case is an example. The Williams rule is needed here to prevent the inconsistency of acquittal of this accused and conviction of a hypothetical "Summers" who engaged in exactly the same conduct, but who was caught a few blocks away by police who first found heroin in his house rather than detaining him briefly.

D. Demoralizing Effect on the Honest Police Officer.

Third, exclusion of evidence reasonably and honestly seized taints the courts by demoralizing the conscientious police officer, making him less likely, not more likely, to understand and follow fourth amendment decisions. Despite dictum in Dunaway v. New York, supra, to the effect that a "single, familiar standard" of

---

* Interview with James Larkin, Assistant District Attorney of Harris County, Texas, in Houston, Nov. 24, 1980.

probable cause guides police officers, that standard immediately dissolves into ambiguity in a concrete factual situation. The variety of probable cause judgments is infinite. It is overlaid by a bewildering array of doctrines such as plain view, stop and frisk, inventory, exigent circumstances, consent, and reasonable investigation. Procedural considerations such as standing and burden of proof likewise influence a variety of causes. An officer rapidly learns that the treatment of these doctrines varies even within the same courthouse from trial judge to trial judge in unpredictable ways. The officer will see a seemingly reasonable search struck down in one case and a borderline one upheld in another. As one prominent Texas criminal defense lawyer has put it,

> "In determining the balance, guidelines have been spelled out by the Supreme Court. A great deal of dif-

> ficulty arises in applying the many guidelines to a particular set of facts. . . . Some magistrates, judges or justices believe the exclusionary rule should be abolished, while other judges believe that the exclusionary rule should not apply where the officer acts in good faith (good faith v. bad faith). Because of the differences of opinion of the judges and justices as to what is reasonable, the decisions dealing with search and seizure appear to be in a constant state of change."

Rawitscher & Carnahan, Search and Seizure and Suppression Procedures, in ADVANCED CRIMINAL LAW COURSE O-1 (D. Crump & State Bar of Texas ed. 1979). If the decisions induce this reaction in a criminal law scholar, they must resemble a roulette wheel to the officer who risks his life in a good faith, reasonable effort to ferret out crime, only to be told that his action was "illegal" and must be deterred by suppression. Research confirms what common sense suggests: police misconduct is most common in situations in which police

officers perceive that they are unlikely to obtain justice in the court system.* Thus, confronted with this maze, an officer is likely to revert to a practice of acting first and asking questions later, particularly if he knows that there will be no recognition of his good faith or reasonableness.

In the instant case, before Dunaway v. New York, it is likely that virtually all police officers would have acted as these officers did. "Protecting the scene" is instinctive. The danger is obvious that someone may be removing evidence when he is observed departing just as police arrive

---

* Cf. N. JOHNSON, L. SAVITZ and M. WOLFGANG, THE SOCIOLOGY OF PUNISHMENT AND CORRECTION 11 (1962) (reporting study concluding that "absence of effective legal means" to accomplish lawful ends or safeguard their dignity induces police officers to engage in illegal conduct).

from a scene at which a magistrate has adjudicated probable cause to believe criminal activity is ongoing. Furthermore, having the premises owner present during a search is good police work. The owner may be able, for instance, to supply a key to a door that would otherwise need to be destroyed. These officers are now impliedly told, however, that such conduct was "wilful" or "at the very least, negligent," to use the words of Michigan v. Tucker. This message can only engender disrespect for the courts in those who strive to enforce the law.

D. Appearance of Shifting and Inconsistent Appellate Decision-Making.

Fourth, the present administration of the exclusionary rule places appellate courts in ostensibly shifting and inconsistent doctrinal positions. This Court, for example, has withheld suppression when the illegality has been attenuated by inter-

vening events, the defendant has lacked standing, the challenge has arisen in a habeas corpus action, use of the evidence was before the grand jury, use was for impeachment, or the resulting arrest was used to increase the sentence in another case.* On occasion, doctrinal justification fails to prevent the appearance of a zig-zag course.** These difficulties are

---

* United States v. Ceccolini, 435 U.S. 368 (1978); Stone v. Powell, 428 U.S. 465 (1976); United States v. Peltier, 422 U.S. 531 (1975); Michigan v. Tucker, 417 U.S. 433 (1974); United States v. Calandra, 414 U.S. 338 (1974); United States v. Tucker, 404 U.S. 433 (1972); Harris v. New York, 401 U.S. 222 (1971).

** Decisions on searches of automobiles taken to other locations are an example. Compare Carroll v. United States, 267 U.S. 132 (1925); Husty v. United States, 282 U.S. 694 (1931); Preston v. United States, 376 U.S. 364 (1964); and Chambers v. Maroney, 399 U.S. 42 (1970) with Coolidge v. New Hampshire, 403 U.S. 443 (1971); Texas v. White, 423 U.S. 67 (1975) and Arkansas v. Sanders, 442 U.S. 753 (1979). Cf. United States v. Rabinowitz, 339 U.S. 56 (1960) (overruling prior authority on search-incident scope); Chimel v. California, 395 U.S. 752 (1969) (overruling Rabinowitz).

the natural result of practical efforts with conflicting policy, but they create a nagging suspicion that interpretive principles cannot be reconciled with a reasonable view of the fourth amendment.

In this case, a narrow margin of votes separates the Michigan Court majority from the dissent. Several doctrines (e.g., attenuation of taint or prevention of evidence destruction) might reasonably be used to justify the seizure. The Michigan dissenters' reasoning could also be so used. But the real reason the evidence should not be suppressed is that in this individual case, regardless of shifting doctrine, the officers acted reasonably and honestly. Forthright recognition of a reasonable, good-faith mistake exception would go far to remove the appearance of ad hoc decision making.

E. Effect on the Accused: Irrelevance of Guilt or Innocence.

Fifth, the exclusionary rule sometimes taints the criminal justice system by inducing the accused to believe that his guilt or innocence is not important. One popular author has written that "innocence becomes less relevant" as the criminal justice system progresses. F. LEE BAILEY, THE DEFENSE NEVER RESTS 1 (1968). Disparate treatment creates cynicism in an accused. It has been identified by prison wardens in some states as a greater cause for prison unrest than food, overcrowding or conditions of incarceration. COUNCIL ON STATE GOVERNMENTS, DEFINITE SENTENCING: AN EXAMINATION OF PROPOSALS IN FOUR STATES 10 (1976). While this finding was stated in the context of sentencing disparity, the same kind of prisoner cynicism is likely to be generated when disparity is

caused by the exclusionary rule.

F. Untruthful Fact Presentation to Jurors by Officers of the Court.

Finally, the exclusion of reasonably and honestly seized evidence taints the criminal justice system by presenting an untruthful impression to the trier of fact. A conscientious defense lawyer is likely to argue to a jury that the government has not presented sufficient evidence in a trial from which evidence has been suppressed. He is likely to follow with criticism of the government for prosecuting a case without the type of evidence that is "missing." The prosecution is prevented from asserting the existence of the evidence or explaining its suppression.*

---

* The "open door" or reply doctrine would allow prosecution response if defense counsel referred by name to the specific item suppressed. But through the exercise of minimal skill, counsel can make a general enough reference to prevent response and still get the point across.

If the seizure was flagrantly improper, suppression may be defensible; however, a juror is likely to feel that he has been unfairly tricked when he learns that the truth has thus been hidden from him by officers of the court notwithstanding a reasonable, good-faith search. Similarly, it is understandable that many attorneys avoid the criminal defense practice because they do not wish to be the tools of such deception.

In the context of the instant case, one need only imagine the accused on trial for possession of the (lawfully seized) heroin found in his house. His defender would argue that nothing connected the accused physically with any contraband. Jurors might well acquit the accused, only to find that the (unlawfully seized) heroin in his pocket was concealed from them by an officer of the court with the court's

own assistance. Such a procedure can only taint both courts and attorneys in the minds of jurors.

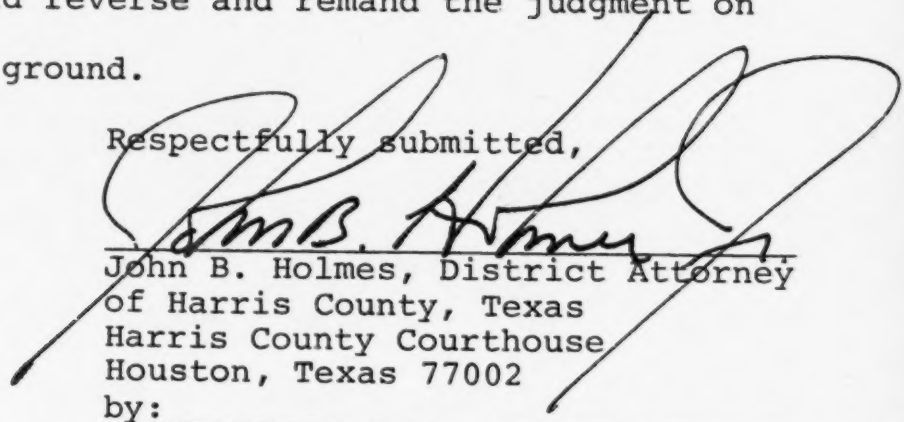
CONCLUSION

For all of these reasons, it is submitted that neither the protection of courts from taint nor the deterrance of illegal police conduct is advanced by the exclusion of evidence seized reasonably and in good faith.

The conduct of the seizure in this case should be adjudicated lawful, and the judgment of the Michigan Supreme Court should be reversed on this ground. In the event that this Court should, however, adjudicate that the seizure was not lawful, the Court should adopt the reasonable, good faith exception from suppression recognized by the Fifth Circuit, and

should reverse and remand the judgment on that ground.

Respectfully submitted,



John B. Holmes, District Attorney
of Harris County, Texas
Harris County Courthouse
Houston, Texas 77002
by: _____
Assistant District Attorney

_____
David Crump, Counsel of Record
for Amici
c/o American Legal Foundation
5450 Fieldwood Drive
Houston, Texas 77056
(713) 749-3878

_____
Of Counsel

CERTIFICATE OF SERVICE

I, David Crump, hereby certify that I have accomplished service of this brief and motion prior to filing by depositing in a United States post office, postage first class prepaid, three copies each to the following, in accordance with Rule 28.3 of the Rules of this Court, on _____, 1980:

Timothy Baughman, Assistant State's Attorney
Frank Murphy Hall of Justice
1441 St. Antoine
Detroit, Michigan 48226
Gerald M. Lorence
2655 Guardian Bldg.
Detroit, Michigan 48226

Supreme Court, U. S.
FILED
DEC 5 1980
MICHAEL RODAK, JR., CLERK

No. 79-1794

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF MICHIGAN, PETITIONER

v.

GEORGE SUMMERS

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1794

THE PEOPLE OF THE STATE OF MICHIGAN, PETITIONER

v.

GEORGE SUMMERS

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether any detention of an individual reasonably suspected of criminal activity, beyond a momentary stop for questioning, is unlawful in the absence of probable cause to arrest.

2. Whether, assuming that the detention of respondent in this case violated the Fourth Amendment, the exclusionary rule requires the suppression of evidence seized from respondent as the result of that detention.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	5
Argument	9
I. The Fourth Amendment permits investigative detentions of modest duration, on the basis of reasonable suspicion of criminal activity, when such detentions are reasonably necessary to further proper law enforcement objectives	9
A. The Michigan Supreme Court's standard for determining whether an arrest has occurred is incorrect	12
B. The Court should not attempt to pass upon the legality of respondent's detention	22
II. Even assuming that respondent was detained in violation of the Fourth Amendment, the exclusionary rule should not be applied to suppress the heroin seized from him following his arrest	25
Conclusion	28

TABLE OF AUTHORITIES

Cases:

Adams v. *Williams*, 407 U.S. 143	11, 12
Brown v. *Illinois*, 422 U.S. 590	8, 18, 25
Brown v. *Texas*, 443 U.S. 47	6, 10, 11, 14
Clark v. *State*, 358 N.E.2d 761	13
Davis v. *Mississippi*, 394 U.S. 721	18
Delaware v. *Prouse*, 440 U.S. 648	10
Dunaway v. *New York*, 442 U.S. 200	4, 6, 8, 10, 16, 17, 18, 19, 26
Marcello v. *United States*, No. 78-1538 (10th Cir. Feb. 20, 1980), cert. denied, No. 79-1688 (Oct. 6, 1980)	14
Miranda v. *Arizona*, 384 U.S. 436	19

PREVIOUS PAGE WAS BLANK

Cases—Continued Page

Morales v. *New York*, 396 U.S. 102 26
People v. *Dunaway*, 61 App. Div. 2d 299, 402 N.Y.S. 2d 490 18
People v. *Harris*, 15 Cal. 3d 384, 540 P.2d 632, 124 Cal. Rptr. 536 14
People v. *Higbee*, 37 Cal. App. 3d 944, 112 Cal. Rptr. 690 13
Rawlings v. *Kentucky*, No. 79-5146 (June 25, 1980) 11, 23
Rhode Island v. *Innis*, No. 78-1076 (May 12, 1980) 19
Stone v. *Powell*, 428 U.S. 465 26
Terry v. *Ohio*, 392 U.S. 1 ..... 4, 6, 10, 11, 15, 26
United States v. *Brignoni-Ponce*, 422 U.S. 873 ..... 10, 11
United States v. *Harris*, 404 F. Supp. 1116 14
United States v. *Klein*, 626 F.2d 22 14
United States v. *Martinez-Fuerte*, 428 U.S. 543 10
United States v. *Mendenhall*, No. 78-1821 (May 27, 1980) 10, 11
United States v. *Peltier*, 422 U.S. 531 ..... 25, 26
United States v. *Richards*, 500 F.2d 1025, cert. denied, 420 U.S. 924 13
United States v. *Short*, 570 F.2d 1051 14
United States v. *Tucker*, 610 F.2d 1007 27
United States v. *West*, 495 F. Supp. 871 14
United States v. *Williams*, 622 F.2d 830, petition for cert. pending, No. 80-5613 25
United States v. *Wylie*, 569 F.2d 62, cert. denied, 435 U.S. 944 14
Ybarra v. *Illinois*, 444 U.S. 85 23

Constitution and statute:

United States Constitution, Fourth Amendment ..... *passim*
Mich. Comp. Laws § 335.341(4)(a) (Mich. Stat. Ann. § 18.1070(41)(4)(a) (1972)) 2
1978 Mich. Pub. Acts, No. 368 2

Miscellaneous:

ALI Model Code of Pre-Arraignment Procedure (Proposed Official Draft 1975) 21
3 W. LaFave, *Search and Seizure, A Treatise On The Fourth Amendment* (1978) 15, 21

INTEREST OF THE UNITED STATES

This case presents an important constitutional question concerning the scope of police power, under the Fourth Amendment, to detain a person reasonably suspected of criminal activity in the absence of probable cause to arrest him. The specific question raised here is whether the police may lawfully detain a resident of a dwelling during the execution of a search warrant for narcotics. Each year, federal agents execute numerous search warrants at various types of premises. Both the Federal Bureau of Investigation and the Drug Enforcement Administration have expressly instructed their agents that, in executing search warrants, they may restrict the movements of persons found on the premises to be searched. The outcome of this case will govern the actions of federal law enforcement officers in executing premises search warrants.

Beyond the particular context of this case, the broader issue of the permissible scope of investigative stops is one that arises in a wide variety of situations and implicates interests of concern to federal law enforcement officers and prosecutors. Fedderal or state officers investigating crimes will often detain a suspect briefly to determine whether that person has engaged or is presently engaging in criminal activity. It is sometimes necessary in the course of such an encounter to obtain further information from different sources concerning whether an offense has been committed or whether the suspect is sufficiently connected with the commission of an offense to warrant his arrest. Whether the detention of a suspect for a limited but more than momentary period in these situations is per se violative of the

Fourth Amendment, or depends for its legality on an assessment of the reasonableness of the officers' actions in the particular circumstances, is a matter of considerable importance to federal law enforcement activities.

STATEMENT

Respondent was charged in the Recorder's Court of the City of Detroit with possession of heroin, in violation of former Mich. Comp. Laws § 335.341(4)(a) (Mich. Stat. Ann. § 18.1070(41)(4)(a) (1972)).[1] He moved prior to trial to suppress the heroin seized from his person at the time of his arrest. The trial court granted the motion to suppress, and both the Michigan Court of Appeals and the Michigan Supreme Court affirmed (Pet. Apps. A and B).

1. The evidence showed that on October 10, 1974, Detroit police obtained a warrant authorizing them to search for heroin and other narcotics at a dwelling located at 9356 Mansfield. In the accompanying affidavit, Officer Roger Lehman stated that on the previous day a reliable informant had purchased a quantity of heroin at the house from an individual named "George" (J.A. 60-61).[2] After obtaining the warrant, a team of Detroit police officers went to the premises to execute the warrant.

As the police approached the house, respondent was observed exiting the premises (H. Tr. 4-5, 29-30).[3] Patrolman Lehman identified himself as a

---

[1] The statute under which respondent was charged has since been repealed and recodified. 1978 Mich. Pub. Acts, No. 368 (effective Sept. 30, 1978).

[2] "George" was described "as being approx 31-33/5-10/170/med bld/med complx/and wearing his hair cut short" (J.A. 61).

[3] "H. Tr." refers to the transcript of the preliminary examination held on October 22, 1974.

police officer, displayed a copy of the search warrant, and asked respondent whether he lived in the house. When respondent answered in the affirmative, Officer Lehman told him to open the front door. Respondent stated that he had left his keys inside and would summon someone over the intercom to open the door (H. Tr. 5). At respondent's request, co-defendant Dwight Calhoun appeared at the front door. Officer Lehman identified himself to Calhoun as a police officer and attempted to open the storm door, which was locked. Calhoun thereupon slammed the inside door shut (H. Tr. 6).

After several other officers forcibly broke down the doors, Officer Lehman observed Calhoun fleeing toward a downstairs bedroom (H. Tr. 7). Before giving chase, Lehman told a fellow officer, Anthony Conant, to bring respondent inside the house (H. Tr. 25, 31-32, 33, 34). Lehman then pursued Calhoun into the bedroom and arrested Calhoun after observing him toss onto a bed a package containing a substance believed to be heroin (H. Tr. 7-8).

Calhoun and five or six other individuals who were inside the house were brought into the living room, where they were detained together with respondent while the officers searched the house (H. Tr. 15, 25, 26-27, 34-35). In the basement Officer Conant discovered two plastic bags containing what appeared to be narcotics. After Officer Conant ascertained that respondent owned the house and lived in it, he arrested respondent. A search incident to the arrest uncovered a quantity of heroin in the pocket of respondent's jacket (H. Tr. 27). It was this heroin that formed the basis of the charge against respondent.

2. In suppressing the evidence, the trial court found that respondent did not reenter the premises voluntarily when he accompanied Officer Conant into the house (M. Tr. 2).[4] In addition, the court concluded that the police lacked probable cause to arrest respondent in connection with the drugs found in the basement and that therefore the heroin found on respondent's person was the fruit of an illegal arrest (M. Tr. 2-3, 9).

The Michigan Court of Appeals affirmed (Pet. App. 1-14). It rejected the prosecutor's arguments that the search of respondent's person was authorized by the warrant to search the premises, and was, in any event, necessary to prevent frustration of the warrant (*id.* at 5-7). The court also rejected the argument that there was probable cause to arrest respondent following the discovery of drugs in the basement. Accordingly, it agreed with the trial court that the heroin seized from respondent was inadmissible as the fruit of an illegal arrest (*id.* at 7-12).

The Michigan Supreme Court also affirmed, three judges dissenting (Pet. App. 15-42). The court ruled (*id.* at 17-18, 22) that Officer Lehman's initial encounter with respondent outside the house was proper under *Terry* v. *Ohio*, 392 U.S. 1 (1968). However, relying on *Dunaway* v. *New York*, 442 U.S. 200 (1979), it held that the "further detention" of respondent "by bringing him into the house," was a seizure of respondent that was unsupported by probable cause and therefore violated the Fourth Amendment (Pet. App. 18). The court read *Dunaway* to hold (Pet. App. 18; emphasis in original) that

---

[4] "M. Tr." refers to the transcript of the proceedings with respect to the suppression motion, held on November 19, 1974.

> detention of a citizen beyond the narrow scope of *Terry* v. *Ohio*, *supra*, and its progeny, is reasonable only if supported by probable cause for arrest. *Thus, the general standard for determining whether a seizure-detention is legal is not whether the police officer's actions were reasonable under the circumstances but rather whether the police officer had probable cause to arrest.*

Since, in the majority's view, the detention of respondent during the execution of the warrant amounted to an arrest and the police did not then have probable cause to believe that respondent had committed a crime, it held that the heroin taken from respondent had to be suppressed as the fruit of an unlawful arrest (Pet. App. 22-23).

The dissenters concluded that under *Terry* v. *Ohio*, *supra*, and its progeny, the transfer of respondent from the porch into the house and his subsequent detention during the execution of the warrant were reasonable under the circumstances,[5] that the police had probable cause to arrest respondent following the discovery of drugs in the basement, and that the heroin found on respondent's person was properly seized incident to a valid arrest (Pet. App. 27-42).

SUMMARY OF ARGUMENT

I

A. In the view of the majority of the Michigan Supreme Court in this case, the permissible scope of a

---

[5] The dissent found that the decision to move respondent inside the house and detain him there was an on-the-spot response to an exigent situation, that it was justified by security considerations, and that the limited intrusion was reasonably tailored to accommodate the officers' legitimate safety concerns (Pet. App. 34-38).

"*Terry* stop" [6] is limited to a momentary detention for brief questioning. The court stated that if the detention is more than momentary, its lawfulness is not to be assessed by the reasonableness of the officers' action under all the circumstances confronting them, but solely by whether the officers had probable cause to arrest (Pet. App. 18). Accordingly, the court refused to find that the detention of respondent while the warrant was executed constituted a seizure "less intrusive than a traditional arrest, * * * the constitutionality of [which] involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown* v. *Texas*, 443 U.S. 47, 50-51 (1979). Rather, it read *Dunaway* v. *New York*, 442 U.S. 200 (1979), to establish that any but the briefest detention must be treated as an arrest requiring probable cause.

We acknowledge *Dunaway's* holding that, even though there may be no formal arrest, certain seizures constitute such a substantial invasion of personal liberty that they are deemed unreasonable in the absence of probable cause. But in *Dunaway* the detention was of approximately two hours' duration, involved transportation of the suspect to the police

---

[6] See *Terry* v. *Ohio*, 392 U.S. 1 (1968). The precise meaning of the term "*Terry* stop" is not inherently clear, and it is possible that different users of the term have different meanings in mind. The most appropriate definition in our view, and the meaning we attach to the term when used in this brief, is a seizure of the person that must be supported by reasonable suspicion but that is not of such magnitude as to require probable cause. The issue in this case is whether the detention of respondent was within the proper confines of that concept.

station, and was undertaken for the purpose of interrogation. And while we think that detentions of lesser duration and severity than in *Dunaway* may nevertheless be of sufficient magnitude to be treated as arrests requiring probable cause, we do not believe that *Dunaway* supports the conclusion that police officers possessing reasonable suspicion short of probable cause may never detain a suspect for a limited period of time (for example, in order to check a computer to see if a suspected car thief's vehicle is listed as stolen, or to bring the victim of a robbery over to see if the suspect is identified as the robber).

In sum, while the line that separates a permissible investigative detention from a detention equivalent to an arrest and requiring probable cause is not yet clearly defined, it is our submission that the line is not where the Michigan Supreme Court drew it, and that extended detentions of limited duration can comport with the demands of the Fourth Amendment if they are reasonable in light of the circumstances confronting the officers at the time.

B. So far as we are aware, the record in this case does not establish the duration of respondent's detention while the officers were executing the search warrant or whether the officers acquired any additional information, during this period of detention but prior to completion of the search, that may have supplied probable cause. Accordingly, we find it difficult to reach any conclusion as to whether the detention of respondent was of sufficient severity to require probable cause. Moreover, even assuming the detention was within the boundaries of a permissible *Terry* stop, the court below never passed upon the reasonableness of the officers' actions in the particular circumstances of this case. (Given its narrow view of the permissible

scope of a *Terry* stop, there was, of course, no need for the majority below to inquire into such matters.) Accordingly, if this Court agrees with us that the Michigan Supreme Court has adopted an improperly narrow view of the permissible scope of a detention based on reasonable suspicion, it may wish to remand this case for further consideration by the state courts under a proper standard.

II

In holding that the heroin seized from respondent was inadmissible because it was the fruit of an illegal detention, the Michigan Supreme Court relied heavily on this Court's decision in *Dunaway* v. *New York*, 442 U.S. 200 (1979). But the search and seizure in this case took place in 1974, not only prior to the decision in *Dunaway* but also before that in *Brown* v. *Illinois*, 422 U.S. 590 (1975), in which the Court condemned an investigative detention of a suspect at a police station for purposes of custodial interrogation. Accordingly, because the police did not and could not reasonably have known that their actions in detaining respondent during execution of the search warrant violated the Fourth Amendment, we submit that, under traditional retroactivity principles, the purposes of the exclusionary rule would not be served by suppressing the evidence that was obtained as a result of that detention. In view of this, we believe there is no occasion for the Court in this case to consider the broader question of a general "good faith" exception to the exclusionary rule.

ARGUMENT

I. THE FOURTH AMENDMENT PERMITS INVESTIGATIVE DETENTIONS OF MODEST DURATION, ON THE BASIS OF REASONABLE SUSPICION OF CRIMINAL ACTIVITY, WHEN SUCH DETENTIONS ARE REASONABLY NECESSARY TO FURTHER PROPER LAW ENFORCEMENT OBJECTIVES

The question raised by the specific context of this case—the right of the police, on the basis of reasonable suspicion not amounting to probable cause, to detain a resident of a dwelling while it is searched for narcotics pursuant to a valid search warrant—is one of considerable practical significance. While we believe that such detentions—if of appropriately limited duration—are often proper under the Fourth Amendment, we do not here urge the Court to adopt any blanket rule on the subject. Rather, we suggest that the police action should be assessed in terms of the particular factual circumstances confronting them in any specific case. Indeed, because the Michigan Supreme Court's decision in the present case is not based on any such analysis, this Court may prefer, if it agrees with us that the decision below was based on a fundamental error in analytic approach, to remand the case for consideration by the state court under appropriate standards.

The basic issue in this case sweeps more broadly than the specific context of detentions during the execution of search warrants, implicating the general standards for assessing the lawfulness of investigative detentions of individuals suspected of criminal activity. A proper identification of the nature of the issue begins with a delineation of what has been settled by prior decisions of this Court. At one end

of the spectrum, it is settled that a seizure of the person (*i.e.*, a forcible restraint of the individual's freedom of movement) is ordinarily prohibited in the absence of reasonable suspicion of criminal activity. See *Terry* v. *Ohio*, 392 U.S. 1 (1968); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Delaware* v. *Prouse*, 440 U.S. 648 (1979); *Brown* v. *Texas*, 443 U.S. 47 (1979); *United States* v. *Mendenhall*, No. 78-1821 (May 27, 1980); cf. *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976). While the precise contours of the "reasonable suspicion" criterion remain to be fleshed out (*e.g.*, *United States* v. *Cortez & Hernandez*, No. 79-404), its role as a demarcation point of police powers is clear.

At the other end of the spectrum are detentions of such duration or severity that they may be undertaken only if probable cause exists to believe that the detained individual has committed a crime. The classic example of such a detention is a traditional arrest, but as is clear from *Dunaway* v. *New York*, 442 U.S. 200 (1979), the formal label attached by the police is not the dispositive factor. Rather, probable cause is required whenever there is a sufficiently substantial invasion of the suspect's freedom of movement. What constitutes a "sufficiently substantial" deprivation of liberty to require probable cause remains to be fleshed out—in part, of course, by the instant case. If, however, a detention is deemed to be of sufficient severity to fall within this category, its lawfulness will not be evaluated by reference to a general reasonableness analysis, but will ordinarily depend solely upon the existence of probable cause (*i.e.*, a detention of this character is deemed unreasonable per se in the absence of probable cause, much as a search of a house is ordinarily deemed

unreasonable per se in the absence of a search warrant).

Between these two points of demarcation are detentions that, while constituting a Fourth Amendment "seizure" of the person, are not so intrusive as to require probable cause. The lawfulness of such detentions is assessed by a general reasonableness standard, weighing all of the pertinent facts and circumstances. As the Court stated in *Brown* v. *Texas*, *supra*, 443 U.S. at 50-51, "[t]he reasonableness of seizures that are less intrusive than a traditional arrest, see *Dunaway* v. *New York*, 442 U.S. 200, 209-210 (1979); *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968), depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977); *United States* v. *Brignoni-Ponce*, [422 U.S. 873, 878 (1975)]. Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." See *Rawlings* v. *Kentucky*, No. 79-5146 (June 25, 1980) slip op. 11 n.5. The intrusion must serve a legitimate governmental interest, must be reasonably related in scope to the purposes that justified the intrusion, and must be based on specific, articulable facts. See *United States* v. *Mendenhall*, *supra*, slip op. 2 (Powell, J., concurring); *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 880-882; *Adams* v. *Williams*, 407 U.S. 143, 146-149 (1972); *Terry* v. *Ohio*, *supra*, 392 U.S. at 20-22.

In the view of the majority of the Supreme Court of Michigan in this case, the foregoing analysis may

be applied only to the limited class of cases involving a momentary detention of a suspect for questioning. Any detention of more than a minute or two (or perhaps any involving physical movement of the suspect) requires probable cause and, in the absence thereof, is unlawful regardless of its reasonableness (see Pet. App. 18). This view we believe to be fundamentally unsound. As we show below, it is inconsistent with the Court's general approach to this aspect of Fourth Amendment law, it unjustifiably restricts appropriate and legitimate law enforcement activities, and it is not required by this Court's decision in *Dunaway*.

A. The Michigan Supreme Court's Standard For Determining Whether An Arrest Has Occurred Is Incorrect

In *Terry* and subsequent cases the Court has held that police officers may briefly detain a person for investigative purposes on less than probable cause, if they have a reasonable suspicion that the individual is engaged in criminal activity. The Court explained the rationale underlying this rule in *Adams* v. *Williams*, *supra*, 407 U.S. at 145-146:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. * * * A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be

most reasonable in light of the facts known to the officer at the time.

It is often necessary for the police in the course of a *Terry* stop to utilize investigative methods other than interrogation to determine whether there is a sufficient basis to arrest the suspect for a criminal offense. Both federal and state courts have been confronted in a wide variety of settings with questions concerning the propriety of detentions for more than the "brief" or "momentary" period alluded to in *Adams*. We think it unjustifiably precludes legitimate police investigative activities, as well as offending the Fourth Amendment's core concept of reasonableness, to condemn such limited but more than momentary detentions as automatically illegal without regard to the facts and circumstances that may justify them.

For example, where an officer stops an individual on the basis of reasonable suspicion that criminal activity is afoot, can the individual be detained for several minutes while a computer check is run to determine whether there are any outstanding warrants against him? See, *e.g.*, *People* v. *Higbee*, 37 Cal. App. 3d 944, 112 Cal. Rptr. 690 (1974); *Clark* v. *State*, 358 N.E.2d 761 (1977).[7] Where an officer stops a suspect near the scene of a robbery that has just occurred, does the officer need probable cause in order

[7] See also *United States* v. *Richards*, 500 F.2d 1025, 1029 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1975) (agents stopped individuals suspected of drug smuggling as they were about to depart on private airplane, and suspects' responses created added suspicion that the plane was stolen; court held that suspects could be detained for more than one hour while agents checked with Federal Aviation Administration to determine whether the plane was stolen).

either to return the suspect to the scene for identification, or to detain the suspect for a few minutes while the victim arrives to make an identification? See, *e.g.*, *United States* v. *Short*, 570 F.2d 1051, 1054-1055 (D.C. Cir. 1978); *United States* v. *Wylie*, 569 F.2d 62, 70-71 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978); *People* v. *Harris*, 15 Cal.3d 384, 540 P.2d 632, 124 Cal. Rptr. 536 (1975). Where an agent has reasonable suspicion but not probable cause to believe that an airplane passenger's bag contains narcotics, can he detain either the passenger or the bag while a drug-detecting dog is brought to the area? See *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980); *United States* v. *West*, 495 F. Supp. 871 (D. Mass. 1980). Where a truck suspected to be stolen is stopped on a highway at night during a blizzard, can the police take the truck and the driver to a nearby police station where lighting conditions will permit an inspection of the truck to compare it with the description of the one that has been stolen? See *Marcello* v. *United States*, No. 78-1538 (10th Cir. Feb. 20, 1980), cert. denied, No. 79-1688 (Oct. 6, 1980); cf. *United States* v. *Harris*, 404 F. Supp. 1116, 1127 (E.D. Pa. 1975).

Although the detention in each of the foregoing examples is more than momentary, we submit that there is no per se rule invalidating them in the absence of probable cause, as the court below held. Rather, the lawfulness of such detentions should be determined on a case-by-case basis by balancing "the degree to which the seizure advances the public interest" against "the severity of the interference with individual liberty." *Brown* v. *Texas*, *supra*, 443 U.S. at 51. As one leading commentator has observed:

> Sometimes the officer will communicate with others, either police or private citizens, in an effort to verify the explanation tendered or to confirm the identification or determine whether a person of that identity is otherwise wanted. Or, the suspect may be detained while it is determined if in fact an offense has occurred in the area, a process which might involve checking certain premises, locating and examining objects abandoned by the suspect, or talking with other people. If it is known that an offense has occurred in the area, the suspect may be viewed by witnesses to the crime. There is no reason to conclude that any investigative methods of the type just listed are inherently objectionable; they might cast doubt upon the reasonableness of the detention, however, if their use makes the period of detention unduly long or involves moving the suspect to another locale.

3 W. LaFave, *Search and Seizure, A Treatise On The Fourth Amendment* 36-37 (1978) (footnotes omitted).

The Michigan Supreme Court appears to take the position that under the Fourth Amendment any intrusion beyond a brief or momentary *Terry* stop is equivalent to an arrest requiring probable cause, even where the intrusion may be modest in scope and reasonably related "to the circumstances which justified the interference in the first place." *Terry* v. *Ohio*, *supra*, 392 U.S. at 20. We believe that this decision ignores the everyday realities of police-citizen encounters. As we have just shown, there are numerous situations in which the officer's suspicions may not be resolved but may be further aroused as a result of questioning a suspect during a *Terry* stop. If any further detention of a suspect for investigation were prohibited in the absence of probable cause, no matter how

limited the intrusion on personal freedom and regardless of the reasonableness of the detention, legitimate law enforcement efforts would be seriously hampered.

The decision in *Dunaway* v. *New York*, *supra*, upon which the court below so heavily relied, does not support its analysis of the Fourth Amendment issue presented here. In *Dunaway*, on the basis of a lead that suggested Dunaway's involvement in a murder but did not establish probable cause to arrest, three police detectives were ordered to "pick up" Dunaway and "bring him in." The detectives located Dunaway at a neighbor's house, placed him in a police car, and drove him to police headquarters. Although he was not told that he was under arrest, he was placed in an interrogation room and subsequently questioned by officers after having been advised of his *Miranda* rights. Dunaway was detained for about two hours from the time the police picked him up until the time he confessed.

Even though Dunaway had not been formally arrested, the Court ruled that his detention violated the Fourth Amendment because it was not supported by probable cause. *Dunaway* thus makes clear that some intrusions upon the freedom of an individual are of such a magnitude that they require probable cause under the Fourth Amendment, whether or not they are technical arrests. As was recognized in *Dunaway* (442 U.S. at 208-211), however, other seizures within the purview of the Fourth Amendment, analogous to the intrusions in *Terry* and its progeny, do not require probable cause.

The problem presented by cases such as the present one is in determining where to draw the line between those intrusions that are sufficiently limited that they may be analyzed in terms of the reasonableness of the officers' justification for the particu-

lar detention and those intrusions that are sufficiently substantial that probable cause (rather than a generalized showing of reasonableness) is required to support them. In his concurring opinion in *Dunaway*, Mr. Justice White pinpointed the dilemma (442 U.S. at 219-220):

> The opinion of the Court might be read to indicate that *Terry* v. *Ohio*, 392 U.S. 1 (1968), is an almost unique exception to a hard-and-fast standard of probable cause. As our prior cases hold, however, the key principle of the Fourth Amendment is reasonableness—the balancing of competing interests. * * * But if courts and law enforcement officials are to have workable rules, * * * this balancing must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers. * * * On the other hand, the need for rules of general applicability precludes neither the recognition in particular cases of extraordinary private or public interests, * * * nor the generic recognition of certain exceptions to the normal rule of probable cause where more flexibility is essential. * * * It is enough, for me, that the police conduct here is similar enough to an arrest that the normal level of probable cause is necessary before the interests of privacy and personal security must give way.

The determination whether, in a given case, police conduct involves a sufficiently substantial interference with personal security to require probable cause depends on consideration principally of the duration of the intrusion, but perhaps also its severity in other respects. The detention in *Dunaway* lasted for two hours but might have continued indefinitely if Dunaway had not made an incriminating statement.

On the basis of duration alone, the detention thus appears to have been sufficiently intrusive to require probable cause. Moreover, the physical move in *Dunaway*—involving a drive to the police station—was also extremely intrusive. The psychological impact of being herded into a police car, taken to police headquarters, and placed in an interrogation room is quite severe.[8]

The purpose of a detention may also be important in drawing the line at which probable cause will be required. Detentions for the purpose of custodial interrogation may appropriately be more strictly limited than those to facilitate investigation by other means. This is so in part because of the unstructured and potentially open-ended nature of the interrogation process, and because the possibility of obtaining a confession may increase in direct proportion to the length of the detention. See *Dunaway* v. *New York*, *supra*, 442 U.S. at 220 (Stevens, J., concurring). *Dunaway* involved custodial interrogation. Dunaway was taken to an interrogation room at the police station, given *Miranda* warnings, and questioned for about an hour (see 442 U.S. at 203 n.2; *People* v. *Dunaway*, 61 App. Div. 2d 299, 303, 402 N.Y.S. 2d 490, 493 (1978) (Denman, J. concurring)) before he made an incriminating statement. The Court in *Dunaway* cited passages from its decisions in *Davis* v. *Mississippi*, 394 U.S. 721 (1969), and *Brown* v. *Illinois*, 422 U.S. 590 (1975), as "reflect[ing] the conclusion that detention for custodial interrogation—regardless of its

---

[8] On the other hand, we believe that it would be appropriate—and not overly intrusive—in certain situations for the police to move a suspect to a different location (*e.g.*, to be identified by witnesses to a crime that has just occurred, or to be protected from a hostile crowd).

label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." 442 U.S. at 216.[9]

While *Dunaway* says something about the kind of detention that is sufficiently intrusive that it must be supported by probable cause,[10] there is obviously a wide array of detentions that are materially less intrusive than that to which Dunaway was subjected, yet at the same time more substantial than the momentary stop for brief questioning that is all the Michigan Supreme Court believes the Fourth Amendment permits police officers possessing a reasonable suspicion short of probable cause. Whatever may be the point at which probable cause should be required because of the concerns adverted to by Justice White in his concurrence in *Dunaway* (see page 17, *supra*), the extremely restrictive view taken by the court below is not justified. Particularly where the

---

[9] As this Court recently observed, the safeguards established in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), stemmed from the Court's concern "that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." *Rhode Island* v. *Innis*, No. 78-1076 (May 12, 1980), slip op. 7. Thus, " '[i]nterrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." *Id.* at 8.

[10] We note that the detention in *Dunaway* probably could not have survived scrutiny even under a pure reasonableness standard. There was, after all, little legitimate police need that could be advanced to explain why Dunaway could not have been detained and questioned where he was found, or at some nearby location, rather than being taken to the police station, and, after a considerable delay, questioned in an interrogation room.

detention is not for the purpose of interrogation, but to pursue some relatively brief independent line of inquiry that may establish the detained individual's probable complicity in a crime, we believe that a proper balance of individual and societal interests requires that the police be permitted to extend the detention beyond the brief moment that the Michigan court would permit. The situations described earlier in our brief (pages 13-14, *supra*) are good illustrations of the kind of police investigative detention that we believe the Fourth Amendment permits, provided the detention is of appropriately limited duration and severity.

The latitude that police would be accorded by permitting limited detentions on the basis of founded suspicion would not leave them in an unstructured wilderness that is likely to lead to serious abuses. First, the power to engage in any kind of forcible detention is limited by the requirement that the police possess specific and articulable grounds for suspecting the individual of unlawful activity. Second, the police will know that any detention beyond a momentary stop must be supported by a specific and articulable purpose that justifies the added imposition on the individual's freedom. Finally, as the courts define the line in cases such as *Dunaway*, the police will also learn that relatively clear outer limits exist to define the power to detain in the absence of probable cause.[11]

---

[11] We are not as skeptical as some of the ability of police, within defined boundaries, to make judgments about the reasonableness of a proposed course of conduct. Such kinds of judgments are in many respects the essence of everyday police work. Officers must assess citizen complaints and decide whether police intervention in a vast range of incidents is appropriate. They must make judgments about how to

While it no doubt supplies even greater clarity, the extremely restrictive line drawn by the Michigan Supreme Court bars far too many legitimate and reasonable police investigative detentions to conform to the Fourth Amendment's fundamental philosophy. As a number of prominent authorities have recognized, the police ought properly be permitted to extend detentions based on reasonable suspicion for some period beyond the initial encounter, if circumstances justify such action. The *ALI Model Code of Pre-Arraignment Procedure* § 110.2(1) (Proposed Official Draft 1975), for instance, recognizes that extended detentions should be authorized, but suggests a specific limit of 20 minutes, beyond which a stop based on reasonable suspicion should not be extended.[12] Professor LaFave concludes that the permissibility of extending a *Terry* stop should turn on "whether the police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon and whether it is rather essential to the investigation that the suspect's presence be continued during that interval. This, in turn, may depend upon such things as the relative seriousness of the offense being investigated and whether the police are inching closer to having probable cause for arrest * * *." 3 W. LaFave, *Search and Seizure*, *supra*, at 40.

---

allocate their resources in pursuing both criminal investigations and community caretaking functions. The nature of their experience and responsibilities demands that they develop a facility for making the kinds of judgments that we think they should be permitted to make in determining whether a suspect should be detained.

[12] While we acknowledge that there is some value to having a specific time limit of the kind proposed by the ALI, we are not at all certain that the establishment of a specific time limit is an appropriate exercise of judicial power.

In sum, whatever may be the outer limits of a permissible detention on reasonable suspicion short of probable cause, we urge the Court to reject the proposition that nothing more than a momentary stop is permissible. Within appropriate outer limits, the lawfulness of an extended *Terry* stop should be measured by the substantiality and rationality of the officers' justification for undertaking it. The inquiry would focus on the purpose of extending the detention—*i.e.*, the specific course of action that the police propose to undertake during the period, and the degree of likelihood that these actions will produce confirmation of their suspicions—and would also consider such factors as the gravity of the offense under investigation, the risk that it will prove difficult subsequently to apprehend the suspect should he be released, the substantiality of the officers' suspicions, the degree of inconvenience caused to the suspect by the detention, and, of course, considerations relating to the officers' personal safety.

B. The Court Should Not Attempt To Pass Upon The Legality Of Respondent's Detention

As we have shown, the Michigan Supreme Court erred in concluding that any seizure that is more intrusive than a momentary *Terry* stop is equivalent to an arrest requiring probable cause. In our view, the Fourth Amendment does not invariably bar the police from detaining a suspect for a more extended period in order to ascertain whether there may be probable cause to arrest that person for commission of a felony. Thus, we believe that, as a general matter, when executing a search warrant for contraband at private premises, the police may detain an occupant of the premises for a limited period, while the search is con-

ducted, so long as there is a sufficient factual basis to expect that at the conclusion of the search they may have probable cause to arrest the individual on felony charges.[13]

We do not believe, however, given the nature of the decision below and of the record before this Court, that it should undertake to decide whether respondent's detention during the execution of the search warrant was lawful. The resolution of that question involves two inquiries: First, was the detention of such duration or character that it should be treated as an arrest requiring probable cause? Second, assuming that it did not cross that line, were the facts and circumstances known to the officers adequate to justify their decision to detain him?

---

[13] Contrary to respondent's argument (Br. in Opp. 4), *Ybarra* v. *Illinois*, 444 U.S. 85 (1979), does not support a different conclusion. In that case, a search warrant authorized the police to search the premises of a public tavern and the person of one named individual (the bartender). The Court held that the Fourth Amendment did not permit the officers to search or frisk patrons who happened to be present on the premises when the warrant was being executed, at least where the officers had neither probable cause nor reasonable suspicion that the patrons were involved in criminal activity. The Court did not address the question whether persons connected with premises to be searched pursuant to a warrant, especially private premises, may be detained while the search is being performed. Indeed, in *Rawlings* v. *Kentucky*, *supra*, slip op. 11, the Court described as an "open question" whether a person may be detained temporarily at the scene of suspected drug activity while a search warrant is being obtained. If the legality of a detention to procure a warrant remains unsettled after *Dunaway* and *Ybarra*, we submit that the propriety of detention of a suspect during the execution of a validly issued warrant could not be deemed foreclosed by those decisions.

With respect to the the first of these inquiries, there are some indications that the detention in this case was not of such a nature as to require probable cause. The detention lasted only as long as was necessary to execute the warrant, and, in sharp contrast to *Dunaway*, it merely involved requiring respondent to stay in the living room of his own home and was not undertaken for the purpose of interrogation. Nevertheless, the record appears to be silent as to the precise magnitude of the detention; we are unable to find any indication whether respondent was detained for ten minutes or for two or three hours during the execution for the warrant. Thus, even if the Court agrees with us that the holding of the court below was in error in restricting the permissible duration of a *Terry* stop, it is difficult to tell whether this detention exceeded properly defined boundaries.

Moreover, even were the Court satisfied that the detention here was not of such a character as to require probable cause, we doubt that it should undertake in the first instance to decide the reasonableness of the officers' actions in detaining respondent in the particular circumstances of this case. While the three dissenters below reached and decided the question, the majority had no occasion to do so because of its view that the detention was unlawful wholly without regard to its reasonableness. Unless the Court decides that the exclusionary rule should not be applied in this case regardless of the lawfulness of the detention (see Part II, *infra*), it seems to us preferable to allow the state courts to pass on the reasonableness issue in the first instance.

II. EVEN ASSUMING THAT RESPONDENT WAS DETAINED IN VIOLATION OF THE FOURTH AMENDMENT, THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED TO SUPPRESS THE HEROIN SEIZED FROM HIM FOLLOWING HIS ARREST

Michigan has argued (Pet. 19-22) that even if the police, in detaining respondent, did not comply with the requirements of the Fourth Amendment as set forth in *Dunaway*, the exclusionary rule should not apply here because the officers acted in good faith and with an objectively reasonable basis to believe that their actions were lawful. We note that the Fifth Circuit, sitting en banc, recently recognized a so-called "good faith" exception to the exclusionary rule. *United States* v. *Williams*, 622 F.2d 830, 840-847 (1980), petition for cert. pending, No. 80-5613. The court in *Williams* held that "evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized." *Id.* at 840. While there may be substantial reasons for this Court to adopt such a rule in an appropriate case, we do not believe that it is necessary for the Court to resolve that issue here. The search and seizure in this case occurred in October 1974, prior not only to the decision in *Dunaway* v. *New York*, *supra*, but also to that in *Brown* v. *Illinois*, 422 U.S. 590 (1975). In our view, the Michigan Supreme Court erred in applying retroactively the principles it distilled from this Court's decision in *Dunaway*.

As this Court observed in *United States* v. *Peltier*, 422 U.S. 531, 535 (1975), "in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, * * * the

Court has concluded that any such new constitutional principle would be accorded only prospective application." The principal purpose of the exclusionary rule is to deter unlawful police conduct. See *Stone* v. *Powell*, 428 U.S. 465, 486 (1976). Although the rule also has been described as protecting the integrity of the judicial process from the taint of illegally seized evidence, the Court's decisions demonstrate that this justification plays only a limited role in determining whether to apply the exclusionary rule in a particular context. *Id.* at 485. The Court in *Peltier* made it plain that neither the deterrent purpose nor the judicial integrity purpose of the exclusionary rule would be served by retroactive application to searches and seizures that the police did not know, and could not reasonably be charged with knowing, were proscribed by the Fourth Amendment. 422 U.S. at 537-538, 542.

At the time of the seizure in this case, no decision of this Court had held unlawful the detention, on reasonable suspicion, of a suspect for investigative purposes.[14] The question was expressly left open in *Terry* (392 U.S. at 19 n.16), and in *Dunaway* the Court stated (442 U.S. at 202) that it was deciding the question that it had reserved ten years earlier in *Morales* v. *New York*, 396 U.S. 102 (1969). While it may well be that *Dunaway* raised questions about the propriety of detaining a suspect for investigative purposes for more than a brief moment, the police in this

---

[14] Similarly, our research has failed to disclose a single reported decision of the Sixth Circuit or the Michigan appellate courts prior to October 1974 that had condemned the type of police conduct involved in this case.

case could not reasonably have known in 1974 that their actions were unlawful.[15]

We note, however, that the Second Circuit, in *United States* v. *Tucker*, 610 F.2d 1007 (1979), applied the Fourth Amendment exclusionary rule to suppress an incriminating statement given by a suspect to the police after he had been detained for several hours in a police station holding pen. The court of appeals noted (*id.* at 1011) that while Tucker's detention had taken place prior to the decision in *Dunaway*, it was subsequent to *Brown* v. *Illinois*, *supra*, in which this Court had condemned the detention of a suspect for custodial interrogation in the absence of probable cause to arrest. The court in *Tucker* concluded that the government had failed to show that the law enforcement officers "could reasonably have believed that their conduct was lawful. Under principles stated in *Brown* and reiterated in *Dunaway*, an involuntary prolonged detention in a police station is an 'arrest' requiring the usual degree of probable cause." 610 F.2d at 1012. Whether or not *Tucker* was correctly decided, we submit that the exclusionary rule should not be applied to suppress the heroin seized from respondent, because here the police could reasonably have believed—as indeed three Justices of the Michigan Supreme Court continued to believe even after *Dunaway*—that their conduct was not in violation of the Fourth Amendment.

---

[15] Indeed, even after *Dunaway*, in *Rawlings* v. *Kentucky*, *supra*, this Court indicated that a detention of the sort that occurred here would not necessarily violate the Fourth Amendment (see note 13, *supra*).

CONCLUSION

The judgment of the Michigan Supreme Court should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

DECEMBER 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 333975 180